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## Supervised Release Is Not Parole

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# SUPERVISED RELEASE IS NOT PAROLE

*Jacob Schuman\**

*The United States has the largest prison population in the developed world. Yet outside prisons, there are almost twice as many people serving terms of criminal supervision in the community—probation, parole, and supervised release. At the federal level, this “mass supervision” of convicted offenders began with the Sentencing Reform Act of 1984, which abolished parole and created a harsher and more expansive system called supervised release. Last term in *United States v. Haymond*, the Supreme Court took a small step against mass supervision by striking down one provision of the supervised release statute as violating the right to a jury trial. But the Justices did not consider all the differences between parole and supervised release, which have far broader consequences for the constitutional law of community supervision.*

*The current consensus among the courts of appeals is that supervised release is “constitutionally indistinguishable” from parole and therefore governed by the same minimal standard of due process. Closer inspection, however, reveals three significant differences between parole and supervised release. First, parole was a relief from punishment, while supervised release is an additional penalty. Second, parole revocation was rehabilitative, while supervised release revocation is punitive. Finally, parole was run by an agency, while supervised release is controlled by courts. Because of these differences, revocation of supervised release should be governed by a higher standard of due process than revocation of parole. In particular, defendants on supervised release deserve more protection against delayed revocation hearings, which may deny them the opportunity to seek concurrent sentencing.*

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## I. INTRODUCTION

The United States has the largest prison population in the developed world: 2.3 million people behind bars.<sup>1</sup> Yet outside prison walls, there are almost twice as many people, 4.5 million, serving terms of criminal supervision in the community—probation, parole, and supervised release.<sup>2</sup> This “mass supervision” of convicted defendants is, as the District Attorney of Philadelphia Larry Krasner recently said, “a major driver of mass incarceration.”<sup>3</sup> Currently, almost 300,000 people are incarcerated for violating conditions of their supervision—one third of all prisoners in thirteen states, and more than half of all prisoners in Arkansas, Idaho, Missouri, and Wisconsin.<sup>4</sup> Proceedings to revoke community supervision are governed by only a minimum standard of due process, with no right to a jury and no right to proof beyond a reasonable doubt.<sup>5</sup>

Mass supervision at the federal level began with the Sentencing Reform Act of 1984, which abolished the old parole regime and created a harsher and more expansive system called “supervised release.” Today, over 100,000 people are serving terms of supervised release—five times more than were under parole—and over 10,000 people are in federal prison for violating the conditions of their release.<sup>6</sup> Last term in *United States v. Haymond*,<sup>7</sup> the Supreme Court took a small step against mass supervision by striking down one provision of the supervised release statute as violating the defendant’s

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1. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL’Y INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html>.

2. DANIELLE KAEBLE, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ251148, PROBATION AND PAROLE IN THE UNITED STATES, 2016 1 (Apr. 2018), <https://www.bjs.gov/content/pub/pdf/ppus16.pdf>.

3. Press Release, Phila. Dist. Attorney’s Office, New Philadelphia D.A.O. Policies Announced March 21, 2019 to End Mass Supervision (Mar. 21, 2019) <https://medium.com/philadelphia-justice/philadelphia-daos-policies-to-end-mass-supervision-fd5988cfe1f1>.

4. Alan Greenblatt, *Probation and Parole Violations Are Filling up Prisons and Costing States Billions*, GOVERNING (June 18, 2019, 6:11 PM), <https://www.governing.com/topics/public-justice-safety/gov-parole-probation-report-criminal-justice.html>.

5. PEW CHARITABLE TRS., NUMBER OF OFFENDERS ON FEDERAL SUPERVISED RELEASE HITS ALL-TIME HIGH (Jan. 2017), [http://www.pewtrusts.org/~media/assets/2017/01/number\\_of\\_offenders\\_on\\_federal\\_supervised\\_release\\_hits\\_alltime\\_high.pdf](http://www.pewtrusts.org/~media/assets/2017/01/number_of_offenders_on_federal_supervised_release_hits_alltime_high.pdf).

6. Jacob Schuman, *America’s Shadow Criminal Justice System*, NEW REPUBLIC, (May 30, 2018), <https://newrepublic.com/article/148592/americas-shadow-criminal-justice-system>.

7. 139 S. Ct. 2369 (2019).

right to a jury trial.<sup>8</sup> But the Justices did not consider all the differences between parole and supervised release, which have far broader consequences for the constitutional law of community supervision.<sup>9</sup>

Until *Haymond*, supervised release had received scant attention from either scholars or courts.<sup>10</sup> During the 1970s, the Supreme Court issued three major decisions on the constitutional rights of parolees, holding that parole revocation was governed by a minimal standard of due process with no other protections under the Bill of Rights.<sup>11</sup> Yet after Congress created supervised release in 1984, the Court spent more than thirty years in silence as to how this new system fit into the nation's constitutional framework. Meanwhile, a consensus arose among the courts of appeals that supervised release was simply a continuation of the old parole system and therefore governed by the old parole precedents. Declaring that parole and supervised release revocations were "constitutionally indistinguishable and . . . analyzed in the same manner,"<sup>12</sup> the circuit courts held that defendants facing revocation of supervised release were entitled to the same bare minimum standard of due process as parolees: a hearing before a judge (but not a jury), with a preponderance-of-the-evidence standard of proof (rather than proof beyond a reasonable doubt), no Fourth Amendment rights, no right against self-incrimination, no right to a

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8. *Id.* at 2378–79.

9. *Id.* at 2380.

10. Fiona Doherty and Christine S. Scott-Hayward are the only legal scholars to have published extensive analyses of supervised release, and this Article is indebted to their work. See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958, 960 (2013); Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 182–83 (2013). The Federal Sentencing Reporter also dedicated a helpful 1994 issue to the subject. See David N. Adair, *Revocation of Supervised Release—A Judicial Function*, 6 FED. SENT'G REP. 190 (1994); Paula Kei Biderman & Jon M. Sands, *A Prescribed Failure: The Lost Potential of Supervised Release*, 6 FED. SENT'G REP. 204 (1994); Sharon O. Henegan, *Revocation of Probation and Supervised Release: A Commission Perspective*, 6 FED. SENT'G REP. 199 (1994); Carlos Juenke, *Using Internal Intermediate Sanctions to Avoid Revocation of Supervised Release for Cocaine Use*, 6 FED. SENT'G REP. 210 (1994); George P. Kazen, *Mandatory Revocation for Drug Use: A Plea for Reconsideration*, 6 FED. SENT'G REP. 202 (1994); Keith A. Koenning, *Supervised Release Violators and the Comprehensive Sanctions Center in the Northern District of Ohio*, 6 FED. SENT'G REP. 208 (1994); Michael A. Stover, *The Future of Supervised Release*, 6 FED. SENT'G REP. 195 (1994); Barbara M. Vincent, *Supervised Release: Looking for a Place in a Determinate Sentencing System*, 6 FED. SENT'G REP. 187 (1994); Thomas N. Whiteside, *The New Challenge of Supervised Release*, 6 FED. SENT'G REP. 211 (1994).

11. See *Moody v. Daggett*, 429 U.S. 78 (1976); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972).

12. *United States v. Hall*, 419 F.3d 980, 985 n.4 (9th Cir. 2005).

speedy trial, no Confrontation Clause right, no right to effective assistance of counsel, and no rights under the Federal Rules of Evidence.<sup>13</sup>

*Haymond* is the Supreme Court's first major decision on the constitutional law of supervised release. Spotlighting the important role of community supervision in the federal criminal justice system, the case also left the Court intractably divided. In a splintered 4–1–4 vote, five Justices agreed to strike down one provision of the supervised release statute that imposed a five-year mandatory minimum sentence on sex offenders who violated their release by committing another sex offense. But unable to settle on a majority opinion, the Justices split over how best to understand the relationship between parole and supervised release.

Justice Gorsuch wrote a plurality opinion, emphasizing “[a]ll that changed beginning in 1984” when “Congress overhauled federal sentencing procedures to make prison terms more determinate and abolish the practice of parole.”<sup>14</sup> While parole supervision replaced prison time, he explained, supervised release is imposed “to encourage rehabilitation *after* the completion” of a full prison sentence.<sup>15</sup> This difference “bears constitutional consequences,” because under *Apprendi v. New Jersey*,<sup>16</sup> any fact increasing a sentencing range must be proved to a jury beyond a reasonable doubt.<sup>17</sup> Parole revocation complied with this rule because it “generally exposed a defendant only to the *remaining* prison term authorized for his crime of conviction,” but the five-year mandatory minimum violated it by “expos[ing] a

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13. See FED. R. CRIM. P. 32.1(b)(2)(A) (procedure for revocation hearing before judge); see also *Johnson v. United States*, 529 U.S. 694, 700 (2000) (preponderance of the evidence standard of proof) (citing 18 U.S.C. § 3583(e)(3)); *United States v. Hulen*, 879 F.3d 1015, 1020 (9th Cir. 2018) (no right against self-incrimination); *United States v. Santana*, 526 F.3d 1257, 1260–62 (9th Cir. 2008) (no speedy trial); *United States v. Rondeau*, 430 F.3d 44, 47–48 (1st Cir. 2005) (no Confrontation Clause); *United States v. Armstrong*, 187 F.3d 392, 393–94 (4th Cir. 1999) (no Fourth Amendment exclusionary rule); *United States v. Frazier*, 26 F.3d 110, 113–14 (11th Cir. 1994) (no Federal Rules of Evidence); *United States v. Allgood*, 48 F. Supp. 2d 554, 559 (E.D. Va. 1999) (no effective assistance of counsel). Even the few favorable decisions for defendants on supervised release compared the system to parole. See, e.g., *United States v. Meeks*, 25 F.3d 1117, 1122–23 (2d Cir. 1994) (retroactive application of mandatory-minimum revocation sentence violated Ex Post Facto Clause).

14. *Haymond*, 139 S. Ct. at 2382.

15. *Id.*

16. 530 U.S. 466 (2000).

17. *Haymond*, 139 S. Ct. at 2381–82.

defendant to an additional . . . prison term well *beyond* that authorized by the jury's verdict."<sup>18</sup>

Justice Breyer wrote a concurrence for himself only, agreeing that the five-year mandatory minimum was unconstitutional because it was too trial-like, but not applying *Apprendi* because of "the potentially destabilizing consequences."<sup>19</sup> He stressed that the mandatory minimum was an unusually punitive outlier from the rest of the supervised release system, which he said was otherwise similar to parole.<sup>20</sup>

Finally, Justice Alito wrote a very frustrated dissent calling the plurality opinion "revolutionary" and even "dangerous" for casting doubt on supervised release.<sup>21</sup> He argued that there was no *Apprendi* problem because the original jury verdict itself authorized the judge to impose the five-year mandatory minimum, and called the plurality's distinction between parole and supervised release "purely formal" with "no constitutional consequences."<sup>22</sup>

The majority vote in *Haymond* is an important reaffirmance of the right to a jury trial in an age of mass supervision. It is also the Court's first official recognition of one significant difference between parole and supervised release: parole replaced prison time, while supervised release adds to it. Nevertheless, the opinions are limited in focus. The Justices solely considered the jury trial right, without addressing the broader due process analysis. The Justices also appeared to agree that parole was otherwise similar to supervised release, with the plurality and dissent describing them as rehabilitative and Justice Breyer stating that the role of the judge was the same in each system.<sup>23</sup>

Although *Haymond* represents a step forward in understanding the constitutional relationship between parole and supervised release, the Court's analysis was incomplete. Closer inspection actually reveals *three* critical differences between the systems:

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18. *Id.* at 2382.

19. *Id.* at 2385–86 (Breyer, J., concurring).

20. *Id.*

21. *Id.* at 2386, 2399 (Alito, J., dissenting).

22. *Id.* at 2388.

23. *See also id.* at 2385 (Breyer, J., concurring) (role of judge same under supervised release and parole). *Compare id.* at 2382 (plurality opinion) (supervised release and parole both rehabilitative), *with id.* at 2389 (Alito, J., dissenting) (noting that supervised release and parole were both intended to provide a period of reform so that a prisoner could return to society and lead a law-abiding life).

- Parole was a relief from punishment, while supervised release is an additional penalty.
- Parole revocation was rehabilitative, while supervised release revocation is punitive.
- Parole was run by an agency, while supervised release is controlled by courts.

Because of these differences, the Supreme Court's parole revocation precedents should not apply to supervised release. Instead, defendants on supervised release deserve more procedural protections before their release is revoked. Treating supervised release like parole can result in significant unfair prejudice to criminal defendants, especially when they challenge delayed hearings to revoke release.

This Article proceeds in four parts. Part II recounts the history of parole and supervised release. Part III reviews the caselaw. Part IV shows how parole and supervised release differ in three significant respects and explains why those differences matter for the constitutional law of community supervision. Finally, Part V applies this analysis to the right to a timely revocation hearing, showing how applying parole precedents to supervised release unfairly denies criminal defendants the opportunity to seek concurrent sentences.

## II. THE HISTORY OF PAROLE AND SUPERVISED RELEASE

The origins of mass supervision predate the modern prison itself. Beginning in the Australian penal colony in the eighteenth century, humanitarian reformers advocated rehabilitating criminal offenders by promising them early relief from punishment. This practice eventually won support in the United States, where it became known as "parole," an essential feature of American criminal justice. In the 1960s and 1970s, however, Americans lost faith in the rehabilitative theory of punishment, leading Congress to enact the Sentencing Reform Act of 1984, which abolished parole and created supervised release. Supervised release was initially intended to be limited and rehabilitative, but a series of amendments over the next two decades transformed it into a harsher and more expansive system.



### A. *Origins of Early Release*

The history of parole begins in 1787, with the British penal colony in Australia.<sup>24</sup> At the time, criminal conduct was punished with fines, torture, or death, while prisons served merely to hold defendants pending trial.<sup>25</sup> But as the crime rate rose at the end of the eighteenth century and “[w]holesale hangings” of criminal offenders grew unpopular, British courts began offering the choice of an alternative punishment—exile in a foreign colony, also known as “transportation.”<sup>26</sup>

Over the next eighty years, Britain transported over 150,000 convicts to its penal colony in Australia, where a colonial Board of Assignment “leased” them to newly arriving settlers.<sup>27</sup> The convicts worked without compensation, while the settlers paid the government “to cover the cost of their maintenance.”<sup>28</sup> If a convict “behaved well” for four, six, or eight years (depending on the length of his sentence), then he could earn a “ticket of leave” that would excuse him from further labor.<sup>29</sup> But even those convicts who received tickets were subject to strict rules and denied basic civil rights, including the right to own property.<sup>30</sup>

Eventually, this exploitative system prompted calls for reform, planting the seeds of an idea that would one day grow into parole. In 1836, the London Society for the Improvement of Prison Discipline persuaded the British government to send a colonial official from Tasmania, Alexander Maconochie, to investigate the mistreatment of Australian convicts.<sup>31</sup> Maconochie published a searing critique of the

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24. See Helen Leland Witmer, *The History, Theory and Results of Parole*, 18 J. AM. INST. CRIM. L. & CRIMINOLOGY 24, 26 (1927).

25. See *id.* at 24–25.

26. *Id.* at 25; see also Edward Lindsey, *Historical Sketch of the Indeterminate Sentence and Parole System*, 16 J. AM. INST. CRIM. L. & CRIMINOLOGY 9, 11 (1925).

27. See Witmer, *supra* note 24, at 25–26; Lindsey, *supra* note 26, at 11. Convict leasing was justified on the ground that the government had paid to transport the convicts to Australia. See Doherty, *supra* note 10, at 965. The practice appears to be an outgrowth of British courts paying private contractors to transport convicts to North America with “a property right in the services of the felons.” Witmer, *supra* note 24, at 24.

28. Doherty, *supra* note 10, at 965.

29. *Id.* (quoting William Molesworth, Sir, SELECT COMMITTEE ON TRANSPORTATION xvii (1837–38)).

30. ALEXANDER MACONOCHE, AUSTRALIANA: THOUGHTS ON CONVICT MANAGEMENT AND OTHER SUBJECTS CONNECTED WITH THE AUSTRALIAN PENAL COLONIES 3–4 (London, John W. Parker, West Strand 1839).

31. Doherty, *supra* note 10, at 966.

colony, condemning what he saw as a “disguised system of slavery.”<sup>32</sup> Convicts lived in the “roughest manner,” he reported, “subject to the most severe regulations” and “equally severe punishments,” including “the chain-gang or the triangle, or . . . hard labor on the roads.”<sup>33</sup> Tickets of leave promised eventual relief, but they were difficult to earn, because “[t]he record kept of prisoners’ conduct only embraces offences,” not “good ordinary behaviour.”<sup>34</sup> Tickets also could be revoked for “trifling irregularities” and “on very slight occasion,” so a “very large proportion” of ticket holders were eventually forced back into labor.<sup>35</sup>

Maconochie proposed that the penal colony’s fundamental flaw was its lack of concern for the convicts’ wellbeing and development. “The essential and obvious error,” he declared, was the “total neglect of *moral* reasoning and influence, and [the] exclusive reliance, in every relation of life, on mere *physical* coercion.”<sup>36</sup> As a result, “[t]he prisoners are all made *bad* men instead of good.”<sup>37</sup> Instead, he suggested, penal officials should encourage their captives’ moral reform. According to him, convicts should not be sentenced to a term of years, but instead required to earn “a fixed number of marks of commendation” in order to win release.<sup>38</sup> Convicts would be awarded “marks” for good behavior and lose them for bad, with the rules of the colony enforced “merely by the gain, or loss, of marks.”<sup>39</sup> By collecting more and more marks, a convict would earn “successive degrees” of freedom, eventually leading to total release.<sup>40</sup> Under this system, Maconochie predicted, criminals would be motivated to better themselves: “[W]hen a man keeps the key of his own prison, he is soon persuaded to fit it to the lock.”<sup>41</sup>

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32. MACONOCHE, *supra* note 30, at 37.

33. *Id.* at 2.

34. *Id.* at 3.

35. *Id.* at 4.

36. *Id.* at 7–8.

37. *Id.* at 11.

38. *Id.* at 21.

39. *Id.*

40. *Id.*

41. Lindsey, *supra* note 26, at 23; *see also* MACONOCHE, *supra* note 30, at 21 (“I am convinced that the Social decorums, virtues, and feelings, which would be thus early and universally elicited, would have the most powerful effect in changing the characters of many, even of the very hardened.”).

Maconochie's proposal became known as the "mark system,"<sup>42</sup> one principle of a broader penal reform movement that advocated for a more humane approach to criminal justice by rehabilitating offenders, rather than inflicting suffering.<sup>43</sup> In the 1850s, Australia won limited self-government and began refusing to accept more convicts, leading the British to turn to prisons as a primary method of punishing criminal defendants.<sup>44</sup> At last forced to reckon with how to administer a large and growing population of domestic prisoners, prison officials in both England and Ireland drew on Maconochie's ideas, experimenting with "progressive stages of confinement" that rewarded good behavior by advancing inmates from solitary imprisonment, to communal labor, and finally to freedom.<sup>45</sup>

Like Maconochie's mark system, these new programs reflected a rehabilitative mindset.<sup>46</sup> Walter Crofton, chair of the Board of Directors of Convict Prisons for Ireland, claimed his "system of measuring the industry and improvement of the criminal, and crediting him with an intelligible value for it" made each prisoner "the arbiter of his own fate, and . . . induced to co-operate with those placed over him in their efforts for his improvement."<sup>47</sup> Joshua Jebb, chair of the English Board, described his "principle of graduation" in similar terms: "Whilst advocating a stringent and repressive system of

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42. Doherty, *supra* note 10, at 967. Maconochie was not the only one to advocate for early release as a means of rehabilitating criminal offenders. A French reformer proposed a similar idea in 1838: "Since the principal aim of the penalty is the reform of the convict, it is desirable that any convict whose moral regeneration is sufficiently assured should be set free." MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 269 (Alan Sheridan trans., Vintage Books ed., 1979) (1977).

43. See Jacob Schuman, *Sentencing Rules and Standards: How We Decide Criminal Punishment*, 83 TENN. L. REV. 1, 8–9 n.28 (2015). The National Prison Association declared in 1870: "The treatment of criminals by society is for the protection of society. But since such treatment is directed to the criminal rather than to the crime, its great object should be his moral regeneration. Hence the supreme aim of prison discipline is the reformation of criminals, not the infliction of vindictive suffering." *Id.*

44. Witmer, *supra* note 24, at 30–31, 34–36.

45. Doherty, *supra* note 10, at 970–75; Witmer, *supra* note 24, at 39.

46. While similar, the Irish and English mark systems differed in important respects, including that release was revocable in the Irish system, but not in the English. See Doherty, *supra* note 10, at 973–76; Witmer, *supra* note 24, at 39–40.

47. Walter Crofton, *The Irish System of Prison Discipline*, in *TRANSACTIONS OF THE NATIONAL CONGRESS ON PENITENTIARY AND REFORMATORY DISCIPLINE* 67 (E.C. Wines ed., Albany, Weed, Parsons & Co. 1871).

discipline . . . I am no less impressed with the advantage of encouraging good conduct by the hope of reward.”<sup>48</sup>

### *B. Development of Parole*

During the second half of the nineteenth century, the mark system won converts across the Atlantic and took root in the United States. In the 1860s, the New York Prison Association began promoting the work of Maconochie, Crofton, and Jebb, declaring that prison should serve “as an adult reformatory, where the object is to teach and train the prisoner in such a manner that, on his discharge, he may be able to resist temptation and inclined to lead an upright, worthy life.”<sup>49</sup> Early release for good behavior was key to achieving this goal, because it “plac[ed] the prisoner’s fate . . . in his own hands by enabling him, through industry and good conduct, to raise himself, step by step, to a position of less restraint; while idleness and bad conduct, on the other hand, keep him in a state of coercion and restraint.”<sup>50</sup>

In 1876, the New York legislature agreed to implement these ideas at a new prison in Elmira.<sup>51</sup> At the Elmira Reformatory, prisoners would be sentenced to a fixed term of years, but the board of managers would also have the “power to establish rules and regulations under which prisoners . . . may be allowed to go upon parole outside of the reformatory buildings and inclosure [*sic*].”<sup>52</sup> Eligibility for “parole” (derived from the French for “word of honor”<sup>53</sup>) would be based on “a system of marks,” which would be “credited for good personal demeanor, diligence in labor and study and for results accomplished” and “charged for derelictions, negligences and offenses.”<sup>54</sup> The board

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48. Joshua Jebb, *Prison Discipline*, in TRANSACTIONS OF THE NATIONAL ASSOCIATION FOR THE PROMOTION OF SOCIAL SCIENCE 434 (George W. Hastings ed., London, John W. Parker, Son, and Bourne, West Strand, 1863).

49. Lindsey, *supra* note 26, at 17 (quoting F.H. WINES, PRISON REFORM, CHARITIES PUBLICATION COMMITTEE 26 (1910)); *see also* Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 488 (1999).

50. Lindsey, *supra* note 26, at 17 (quoting F.H. WINES, PRISON REFORM, CHARITIES PUBLICATION COMMITTEE 26 (1910)); *see also* Charlton T. Lewis, *The Indeterminate Sentence*, 9 YALE L.J. 17, 19 (1899) (“Let society hold its enemy in duress until he ceases to be its enemy. This rule protects the community and furnishes to the criminal the motive for adjusting himself to its order.”).

51. Lindsey, *supra* note 26, at 17, 21.

52. ANNUAL REPORT OF THE BOARD OF MANAGERS OF THE N.Y. STATE REFORMATORY AT ELMIRA, N.Y. FOR THE YEAR ENDING SEPTEMBER 30, 1888 54 (1889) [hereinafter ANNUAL REPORT].

53. Doherty, *supra* note 10, at 981 n.139.

54. ANNUAL REPORT, *supra* note 52, at 55–56.

of managers would also enjoy “full power” to “retake and reimprison any convict” who violated the “rules and regulations” governing his release.<sup>55</sup>

Zebulon Brockway, superintendent of Elmira, advocated this system as a way to encourage prisoners to rehabilitate themselves:

Captivity, always irksome, is now unceasingly so because . . . the duty and responsibility of shortening it and of modifying any undesirable present condition of it devolve upon the prisoner himself . . . . Naturally, these circumstances serve to arouse and rivet the attention upon the many matters of the daily conduct which so affect the rate of progress toward the coveted release. . . . Habitual careful attention with accompanying expectancy and appropriate exertion and resultant clarified vision constitute a habitus not consistent with criminal tendencies.<sup>56</sup>

Brockway was apparently good on his word—nine out of ten inmates at Elmira earned early release from prison within their first three years.<sup>57</sup>

The experiment at Elmira quickly won converts across the country.<sup>58</sup> Between 1875 and 1900, twenty states passed laws allowing prisoners to earn early release for good behavior; by 1927, the number was forty-seven; and by the 1950s, every state in the nation had embraced parole.<sup>59</sup> The federal government enacted its own Parole Act in 1910,<sup>60</sup> creating a separate parole board for each federal prison, later consolidated in a single United States Parole Commission in Washington, D.C., with members appointed by the President and confirmed by the Senate.<sup>61</sup>

Under the federal parole system, sentencing worked as follows: A district judge would sentence a defendant to a fixed term of years of

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55. *Id.* at 54–55.

56. Lindsey, *supra* note 26, at 27–28.

57. Doherty, *supra* note 10, at 982.

58. Lindsey, *supra* note 26, at 30–32.

59. Doherty, *supra* note 10, at 982–83; Petersilia, *supra* note 49, at 489; Lindsey, *supra* note 26, at 30–40.

60. Parole Act, ch. 387, § 1, 36 Stat. 819 (1910), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2006)). Before 1910, federal prisoners received “good-time” credit for each month they obeyed prison rules, with no supervision after their release. Lindsey, *supra* note 26, at 56.

61. Peter B. Hoffman, *History of the Federal Parole System: Part I (1910–1972)*, 61 FED. PROB. 23, 23 (1997).

imprisonment from within a range set by statute.<sup>62</sup> After he had served one-third of that term, the Parole Commission could grant him early release from prison if he had “substantially observed the rules of the institution” and his return to the community would neither “depreciate the seriousness of his offense or promote disrespect for the law” nor “jeopardize the public welfare.”<sup>63</sup> Upon release, the parolee would be subject to supervision by a parole officer, who would enforce “conditions of parole” set by the Commission.<sup>64</sup> If the Commission found that the parolee had violated a condition, then it could revoke his parole and send him back to prison to serve out the remainder of his original sentence.<sup>65</sup> Representative Henry D. Clayton of Alabama, who introduced the parole legislation in the House, declared it “in accordance with the enlightened sentiment of the day, the progressive spirit of the times, and in harmony with the philanthropy of the day and age, that would aid suffering humanity and at the same time lend a helping hand toward the reformation of convicted criminals.”<sup>66</sup>

### C. Turn Against Indeterminate Sentencing

By the 1970s, parole “ha[d] become an integral part of the [country’s] penological system.”<sup>67</sup> At the system’s height, the Parole Commission granted early release to more than two-thirds of federal inmates,<sup>68</sup> and parole boards across the country granted it in approximately three-fourths of all cases.<sup>69</sup> Parole fit into a model of criminal punishment known as “indeterminate sentencing,” where the penalty for the crime was not fully determined in advance of its commission.<sup>70</sup> Instead, Congress defined a statutory range for each offense, the judge selected a sentence from within that range for each

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62. 18 U.S.C. § 4205(a) (2012).

63. 18 U.S.C. §§ 4205(a) (2012), 4206(a) (2012) (repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2006))); *see also* Vincent, *supra* note 10, 187 n.1 (“Within these parameters, the United States Parole Commission selected the actual time of release by either setting a parole date or deciding that the inmate should be held until his or her mandatory release date.”).

64. 18 U.S.C. §§ 4209 (repealed 1987), 4214 (2012) (repealed by Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551–3742 (2006))).

65. *Id.*

66. Doherty, *supra* note 10, at 984–85.

67. *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972).

68. *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 30 (1979) (Marshall, J., dissenting in part).

69. Petersilia, *supra* note 49, at 489.

70. *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

defendant, and the parole board determined when prisoners were ready to be released.<sup>71</sup>

Yet, after one-hundred years of dominance, parole started to lose support. In the 1960s and 1970s, a bipartisan consensus emerged in favor of a more determinate approach to punishment.<sup>72</sup> Critics on the left questioned the moral authority of parole boards to decide whether a person was ready to leave prison and criticized socio-economic disparities in who was granted parole.<sup>73</sup> Critics on the right argued that criminal offenders deserved to be punished for their crimes, not released early or coddled with attempts at reform.<sup>74</sup> Widely-read empirical studies suggested that prisons “have had no appreciable effect on recidivism,”<sup>75</sup> leading many to doubt “that prison programs could ‘rehabilitate individuals on a routine basis’—or that parole officers could ‘determine accurately whether or when a particular prisoner ha[d] been rehabilitated.’”<sup>76</sup>

Parole’s most influential critic was Judge Marvin Frankel of the Southern District of New York, who condemned indeterminate sentencing in his 1972 book, *Criminal Sentences: Law Without Order*.<sup>77</sup> Judge Frankel described parole boards as capricious and secretive, and questioned their “supposed expertise” in predicting when any particular inmate was ready for release.<sup>78</sup> He argued that the arbitrariness of the parole boards’ decisions encouraged prisoners to become cynical and manipulative: “The theory of rehabilitative benefit from the striving for parole is dissolved in an acid certainty among the supposed beneficiaries that the task is to find the muscle or the stratagems for beating a rotten system.”<sup>79</sup>

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71. See *id.* at 364–65; Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 680–84 (1996).

72. Schuman, *supra* note 43, at 11–12.

73. See *Mistretta*, 488 U.S. at 365–66; Petersilia, *supra* note 49, at 492–93; see also KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 11–12 (1969).

74. See Doherty, *supra* note 10, at 993–94; see also ERNEST VAN DEN HAAG, PUNISHING CRIMINALS: CONCERNING A VERY OLD AND PAINFUL QUESTION 182 (1975) (“It seems almost a truism that criminals should be punished so there will be less crime.”); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 37 (Ne. Univ. Press ed., 1986) (1976).

75. Doherty, *supra* note 10, at 994; see also Schuman, *supra* note 43, at 11 (“Anecdotal and empirical evidence suggested that prisons were not reforming most offenders; meanwhile, crime rates were rising.”).

76. *Tapia v. United States*, 564 U.S. 319, 324–25 (2011) (citation omitted).

77. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 90 (1973).

78. *Id.* at 90, 109.

79. *Id.* at 49.

Judge Frankel's opposition to parole reflected his firm rejection of the rehabilitative theory of punishment.<sup>80</sup> Sentencing policy in the mid-twentieth century was based on a "medical" model of imprisonment that echoed Maconochie's call for the moral improvement of criminal offenders, viewing them as "sick" and needing "treatment" in prison.<sup>81</sup> Parole boards were essential to this effort because they served "to administer indeterminate sentences by determining when the 'patient' was cured."<sup>82</sup> Judge Frankel ridiculed this idea: "We sentence many people every day who are not 'sick' in any identifiable respect, and are certainly not candidates for any form of therapy or 'rehabilitation' known thus far. . . . Instead, they have coldly and deliberately figured the odds, risked punishment for rewards large enough . . . to justify the risk, but then had the misfortune to be caught."<sup>83</sup> Therefore, he argued, "there should be no occasion for an indeterminate sentence," since all legitimate sentencing considerations were "knowable on the day of sentencing."<sup>84</sup> "[T]he apparatus of parole and parole-board procedures needs drastic revision," he declared, suggesting that all prisoners should serve "a definite sentence, known and justified on the day of sentencing."<sup>85</sup>

#### *D. End of Parole*

What followed in the late 1970s was "a true 'sentencing revolution' in which the highly-discretionary indeterminate sentencing systems that had been dominant for nearly a century" were "replaced by a diverse array of sentencing structures."<sup>86</sup> Despite this diversity, reformers were united in their goal of making sentences more determinate by abolishing parole and requiring defendants to serve their full prison terms.<sup>87</sup> Legislation inspired by Judge Frankel's

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80. *Id.* at 90, 109.

81. See Alan M. Dershowitz, *Criminal Sentencing in the United States: An Historical and Conceptual Overview*, 423 ANNALS AM. ACAD. POL. & SOC. SCI. 117, 128 (1976); FRANKEL, *supra* note 77, at 89; see also Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 388–89 (2006) ("The rehabilitative ideal was often conceived and discussed in medical terms . . . ."); MACONOCHE, *supra* note 30, at 7–8 (discussing the need for moral reasoning and influence).

82. Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011, 1016 (1991).

83. FRANKEL, *supra* note 77, at 90, 109.

84. *Id.*

85. *Id.* at 98, 116.

86. Berman, *supra* note 81, at 395.

87. See *id.*



proposals failed at the federal level in 1975, but inspired states to begin eliminating their parole systems one by one.<sup>88</sup> Maine went first in 1976, followed by California and Indiana.<sup>89</sup> By 1984, ten states had ended parole, and by the year 2000, every state in the country had enacted determinate sentencing reforms.<sup>90</sup>

Congress abolished the federal parole system in the Sentencing Reform Act of 1984, which enacted “sweeping reforms” to the nation’s criminal justice system.<sup>91</sup> The Act implemented Judge Frankel’s proposals by creating a determinate sentencing system in which defendants would serve their prison terms in full, with no opportunity for parole.<sup>92</sup> The Act also expressly rejected the rehabilitative theory of imprisonment, instructing sentencing courts to “recogniz[e] that imprisonment is not an appropriate means of promoting correction and rehabilitation.”<sup>93</sup> The Senate Report linked this rejection of rehabilitation to the abolition of parole: “[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.”<sup>94</sup>

Although the Sentencing Reform Act abolished parole, it still offered two extremely limited ways for prisoners to earn early release.<sup>95</sup> First, every year a prisoner “displayed exemplary compliance with institutional disciplinary regulations,” he could receive thirty-six days of “good time” credit, or approximately 10 percent off his sentence.<sup>96</sup> Second, the Act instructed the Bureau of Prisons, “to the extent practicable,” to allow prisoners to “spend[] a

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88. Doherty, *supra* note 10, at 995.

89. Petersilia, *supra* note 49, at 494–95.

90. See Thomas B. Marvell & Carlisle E. Moody, *Determinate Sentencing and Abolishing Parole: The Long-Term Impacts on Prisons and Crime*, 34 CRIMINOLOGY 107, 108 (1996); Berman, *supra* note 81, at 394 n.41; Petersilia, *supra* note 49, at 495.

91. *Mistretta v. United States*, 488 U.S. 361, 366 (1989).

92. Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 228–30 (1993); Doherty, *supra* note 10, at 995.

93. 18 U.S.C. § 3582(a) (2012); see also *Tapia v. United States*, 564 U.S. 319, 324–25 (2011) (“[T]he system’s attempt to ‘achieve rehabilitation of offenders had failed.’” (quoting *Mistretta*, 488 U.S. at 366)); *Mistretta*, 488 U.S. at 366–67.

94. S. REP. NO. 98-225, at 38 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182.

95. Doherty, *supra* note 10, at 996; Stith & Koh, *supra* note 92, at 226, n.10.

96. Doherty, *supra* note 10, at 996; Stith & Koh, *supra* note 92, at 226, n.10. This figure was later increased to fifty-four days. See 18 U.S.C. § 3624(b) (2012).

portion of the final months of [their] term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry . . . into the community.”<sup>97</sup> In practice, this meant prisoners would spend the last few months of their sentences in a halfway house or community correctional facility, with probation officers available to “offer assistance” during this time.<sup>98</sup>

### *E. Creation of Supervised Release*

To replace parole supervision after prison, the Sentencing Reform Act created a new kind of sentence called “supervised release.” Since the Parole Commission no longer had a role to play, the same judge who imposed the prison sentence was also assigned the power to choose a set of conditions that the defendant would have to obey for a term of years following his release.<sup>99</sup> Supervised release would be imposed at the sentencing hearing, at the same time as the sentence of imprisonment.

This change was intended to rationalize the imposition of post-release supervision. Under parole, the length of the supervision term depended on “the time left on the original sentence,” rather than “the needs of the defendant.”<sup>100</sup> As a result, parole terms were often lengthy and irrational. A well-behaved prisoner would be granted early release and then have to serve a long term of supervision in the community, while a poorly-behaved prisoner would not be granted release and so would have no supervision at all. Under supervised release, by contrast, judges would impose supervised release based on the individual facts of each case, so that “probation officers will only be supervising those releasees . . . who actually need supervision.”<sup>101</sup> The legislative history gives as specific examples a defendant who will serve a very long prison sentence and need transitional support to return to the community, or a defendant with a special “need[]” for “supervision and training programs after release.”<sup>102</sup>

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97. 18 U.S.C. § 3624(c)(1) (2012).

98. *Id.* § 3624(c)(3).

99. See 18 U.S.C. § 3583 (2016), *invalidated by* United States v. Haymond, 869 F.3d 1153 (10th Cir. 2017); U.S. SENTENCING GUIDELINES MANUAL § 7A(2)(b) (U.S. SENTENCING COMM’N 2016).

100. Biderman & Sands, *supra* note 10, at 204.

101. S. REP. NO. 98-225, at 125 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182.

102. *Id.* at 124.

Perhaps most significantly, the Sentencing Reform Act provided no mechanism to revoke a defendant's supervised release.<sup>103</sup> Neither judges nor probation officers would have the power to send defendants back to prison for violating their conditions of release, because Congress "did not believe that a minor violation of a condition of supervised release should result in resentencing of the defendant," and "a more serious violation [c]ould be dealt with as a new offense."<sup>104</sup> Only if a defendant repeatedly and flagrantly violated the conditions of his release could the government charge him with criminal contempt of court, but this would require a trial affording the defendant full constitutional protections.<sup>105</sup> Supervised release would "provide rehabilitative services, but not in the guise of the coerced cure."<sup>106</sup>

Yet just two years after passing the Sentencing Reform Act, Congress enacted the first in a series of amendments that transformed supervised release into a harsher and more expansive system. The most significant change came in the 1986 Anti-Drug Abuse Act, which added a revocation mechanism empowering judges to "revoke a term of supervised release" and sentence a defendant to imprisonment if the United States Attorney's Office proved "by a preponderance of the evidence that the defendant violated a condition of supervised release."<sup>107</sup> Proceedings to revoke supervised release would be governed by the same rules as parole revocation, set forth in Federal Rule of Criminal Procedure 32.1.<sup>108</sup>

Over the next two decades, Congress voted again and again to extend the reach of the supervised release system and enhance the penalties for violations. In addition to adding a revocation mechanism, the 1986 Act imposed mandatory minimum terms of supervised release on federal defendants convicted of drug-trafficking crimes.<sup>109</sup> In 1987, Congress voted to increase both the terms of supervised release and the prison sentences for violations.<sup>110</sup> In 1994, Congress

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103. See Biderman & Sands, *supra* note 10, at 204.

104. See *id.*; Harry B. Wooten, *Violation of Supervised Release: Erosion of a Promising Congressional Idea into Troubled Policy and Practice*, 6 FED. SENT'G. REP. 183, 183 (1994).

105. Doherty, *supra* note 10, at 999–1000.

106. *Id.* at 999.

107. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-7.

108. See *id.*

109. See *id.* at 3207-3–3207-5.

110. Sentencing Act of 1987, Pub. L. No. 100-182, §§ 8, 25, 101 Stat. 1266, 1267, 1272.

enacted a “mandatory revocation” provision, requiring judges to revoke release and impose a sentence of imprisonment if a defendant violated his release by possessing a controlled substance, possessing a firearm, or refusing a drug test.<sup>111</sup> That same year, Congress also authorized judges to impose additional terms of supervised release as punishment when defendants violated their original terms of supervised release.<sup>112</sup> In 2002, Congress expanded mandatory revocation by requiring judges to impose a sentence of imprisonment on defendants who failed three drug tests in a single year.<sup>113</sup> Finally, in 2003, Congress increased the prison sentences for multiple supervised release violations and implemented lifetime supervised release and mandatory revocation for sex offenders.<sup>114</sup>

The legislative history for these amendments is very thin,<sup>115</sup> and what exists does not suggest a rehabilitative mission. The revocation mechanism was the result of lobbying by probation officials who sought greater leverage to enforce conditions of supervised release against defendants.<sup>116</sup> The House Report accompanying the 2003 amendment cited the views of “prosecutors regarding the inadequacy of the existing supervision periods for sex offenders . . . whose criminal conduct may reflect deep-seated aberrant sexual disorders that are not likely to disappear within a few years of release from prison.”<sup>117</sup>

The Sentencing Commission also played a significant role in expanding and toughening supervised release.<sup>118</sup> As the agency created by the Sentencing Reform Act to promulgate federal Sentencing Guidelines, the Commission’s very first edition in 1987 directed that district courts “shall” impose a term of supervised release

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111. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110505, 108 Stat. 1796, 2016–17.

112. *Id.* at 2017.

113. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 2103, 116 Stat. 1758, 1793 (2002).

114. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 101, 117 Stat. 651, 652.

115. See Doherty, *supra* note 10, at 1001 (“[L]ittle consideration seems to have been given to the conceptual differences between supervised release and probation,” and “[t]he adoption of the revocation mechanism did not even warrant a separate header to draw attention to the change.”).

116. *Id.* at 1001–02; see also Vincent, *supra* note 10, at 188 (adding revocation mechanism because “without a realistic threat of reincarceration, some offenders would violate the conditions of supervised release with impunity”).

117. H.R. REP. NO. 108-66, at 49–50 (2003), as reprinted in 2003 U.S.C.C.A.N. 683.

118. U.S. SENTENCING GUIDELINES MANUAL § 5D3.1(a) (U.S. Sentencing Comm’n 1987).

whenever they sentence a defendant to more than one year in prison, and “may” impose supervised release “in any other case.”<sup>119</sup> Every subsequent edition of the Guidelines has featured this same instruction, with the only exception being for defendants who are “deportable alien[s]” and thus “likely [to] be deported after imprisonment.”<sup>120</sup> The Commission also adopted a highly punitive view of revocation, instructing that courts should aim to “sanction primarily the defendant’s breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator.”<sup>121</sup>

The cumulative effect of these changes has made supervised release into a more expansive, more rigid, and more punitive system. District judges now impose supervised release in 99 percent of eligible cases, with the average term lasting forty-one months (not counting those sentenced to lifetime supervised release).<sup>122</sup> In 2015, the number of people on supervised release hit an all-time high of 115,000—five times more than were under parole.<sup>123</sup> Revocations have also become more common,<sup>124</sup> and more than half of all revocations are for non-criminal conduct.<sup>125</sup> One-third of all defendants are eventually found in violation of a condition of their release, with the average revocation sentence lasting eleven months.<sup>126</sup> In 2009, over 10,000 people were in federal prison for violating their supervised release,<sup>127</sup> which was between 5 and 10 percent of the total federal prison population.<sup>128</sup> While Congress intended supervised release to *reduce* government

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119. *Id.*

120. U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(c) (U.S. SENTENCING COMM’N 2018). Nonetheless, over 90 percent of non-citizen defendants are still sentenced to supervised release. See U.S. SENTENCING COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 60 (2010), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722\\_Supervised\\_Release.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf).

121. U.S. SENTENCING GUIDELINES MANUAL § 7A3(b) (U.S. SENTENCING COMM’N 2018).

122. See U.S. SENTENCING COMM’N, *supra* note 120, at 49–50.

123. See Schuman, *supra* note 6; PEW CHARITABLE TRS., *supra* note 5.

124. See Whiteside, *supra* note 10, at 211 (“Approximately one-half of the districts report that there are more revocation actions than in the past . . .”).

125. Doherty, *supra* note 10, at 1016. The Sentencing Guidelines suggest a long list of conditions of release. U.S. SENTENCING GUIDELINES MANUAL § 5D1.3 (U.S. SENTENCING COMM’N 2018). Judge Richard Posner counted ten “mandatory” conditions of release, fourteen “standard” conditions, and thirteen “special” or “additional” conditions. *United States v. Thompson*, 777 F.3d 368, 372–73 (7th Cir. 2015).

126. U.S. SENTENCING COMM’N, *supra* note 120, at 63.

127. *Id.* at 69.

128. *Statistics*, FED. BUREAU PRISONS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) (last visited Feb. 23, 2020).

interference in the lives of former prisoners, it instead has become a system of mass supervision.

### III. CASELAW ON PAROLE AND SUPERVISED RELEASE

Given the important role of supervised release in the federal criminal justice system, the constitutional law of community supervision has not received the attention it deserves. In the 1970s, the Supreme Court issued a series of three decisions defining the constitutional rights of parolees, affording them limited procedural protections before their release could be revoked.<sup>129</sup> But after Congress abolished parole and created supervised release in 1984, the Court spent thirty years without addressing this new system. Meanwhile, the courts of appeals unanimously concluded that the two systems were not meaningfully different and therefore governed by the same minimal standard of due process. Last term in *United States v. Haymond*, the Supreme Court issued its first major decision on the constitutional law of supervised release, recognizing at least one important difference between the two systems, and striking down a provision of the supervised release statute as violating the Fifth and Sixth Amendment right to a jury trial.<sup>130</sup>

#### A. Supreme Court's Parole Decisions

Parole has a long history in the United States, but the Supreme Court did not decide a major case on parole revocation until the 1970s, when it issued a series of three decisions defining the limited constitutional rights of parolees.<sup>131</sup> Emphasizing the system's administrative and rehabilitative nature, the Court held that parole revocation was governed by a minimal standard of process under the Fifth Amendment's Due Process Clause, with no other protections under the Bill of Rights.

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129. See *Moody v. Daggett*, 429 U.S. 78, 79 (1976); *Gagnon v. Scarpelli*, 411 U.S. 778, 790–91 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 487–89 (1972).

130. *United States v. Haymond*, 139 S. Ct. 2369 (2019).

131. A fourth decision, *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979), held that prisoners had “no constitutional or inherent right” to be granted parole and therefore no right to due process in such decisions. *Id.* at 7–8. Just like the parole revocation decisions, *Greenholtz* emphasized the system's rehabilitative and administrative features, which “differ[ed] from the traditional mold of judicial decisionmaking in that the choice involve[d] a synthesis of record facts and personal observation filtered through the experience of the decisionmaker and leading to a predictive judgment as to what is best both for the individual inmate and for the community.” *Id.* at 8.

The Supreme Court's first and most important decision on parole revocation was *Morrissey v. Brewer*<sup>132</sup> in 1972, which held that parolees had a limited right to due process before their release could be revoked.<sup>133</sup> Because "revocation of parole is not part of a criminal prosecution," the Court explained, "the full panoply of rights due a defendant in such a proceeding does not apply."<sup>134</sup>

In excluding parole revocation from the Bill of Rights, the Court emphasized the unique "function of parole in the correctional process."<sup>135</sup> Parole was a grant of early release from prison "on the condition that the prisoner abide by certain rules during the balance of the sentence," with a goal of "help[ing] individuals reintegrate into society as constructive individuals as soon as they are able."<sup>136</sup> Parole supervision was "not directly by the court but by an administrative agency."<sup>137</sup> These features of parole revocation differed fundamentally from criminal prosecution, and therefore the ordinary trial rights did not apply.<sup>138</sup>

To determine the minimum procedural standards for parole revocation, the Court balanced the interests at stake.<sup>139</sup> First, the "liberty of the parolee, although indeterminate, includes many of the core values of unqualified liberty," and therefore was "valuable and must be seen as within the protection of the Fourteenth Amendment," requiring "some orderly process, however informal."<sup>140</sup> That liberty interest was diminished, however, because the parolee did not enjoy "the absolute liberty to which every citizen is entitled," but only a "conditional liberty properly dependent on observance of special parole restrictions."<sup>141</sup> For its part, the state had an "overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial," because it had found the parolee guilty of a crime, yet agreed to release him "with the recognition that with many prisoners there is a risk that they will not

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132. 408 U.S. 471 (1972).

133. *Id.* at 480.

134. *Id.*

135. *Id.* at 477.

136. *Id.* The Court also noted that parole "serves to alleviate the costs to society of keeping an individual in prison." *Id.*

137. *Id.* at 480.

138. *Id.*

139. *Id.* at 481-84.

140. *Id.* at 482.

141. *Id.* at 480.

be able to live in society without committing additional antisocial acts.”<sup>142</sup> Finally, “[s]ociety has a stake in whatever may be the chance of restoring [the parolee] to normal and useful life within the law,” as well as “in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation.”<sup>143</sup>

In light of this balancing analysis, the Court concluded that parolees had the right to a revocation hearing “within a reasonable time” after being “taken into custody,” where they should have “an opportunity to be heard,” to present evidence, and to argue against revocation.<sup>144</sup> Although the Court would not “write a code of procedure” for these proceedings, it did set forth “the minimum requirements of due process”<sup>145</sup> as follows:

- (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.<sup>146</sup>

These rules were later formalized for federal parole and probation revocations in Federal Rule of Criminal Procedure 32.1.<sup>147</sup>

The Supreme Court’s second major decision on parole revocation came the next year in *Gagnon v. Scarpelli*,<sup>148</sup> which held that parolees had no absolute right to appointed counsel, but rather should be

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142. *Id.* at 483.

143. *Id.* at 484.

144. *Id.* at 488.

145. *Id.* at 488–89.

146. *Id.*

147. FED. R. CRIM. P. 32.1 (advisory committee’s note to 1979 addition); *see also* United States v. Tham, 884 F.2d 1262, 1265 (9th Cir. 1989) (“In *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 93 S. Ct. 1756, 1759, 36 L.Ed.2d 656 (1973), the Supreme Court held that probationers were entitled to the due process rights provided to parolees, as outlined in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). These rights are codified in Rule 32.1 of the Federal Rules of Criminal Procedure.”).

148. 411 U.S. 778 (1973).



assigned attorneys on a “case-by-case basis.”<sup>149</sup> The opinion “dr[e]w heavily on the opinion in *Morrissey*,”<sup>150</sup> and indeed adopted the same basic logic: because parole was rehabilitative and administrative, revocation was subject to a reduced standard of due process.

The Court explained that parole’s primary purpose was “to help individuals reintegrate into society as constructive individuals as soon as they are able.”<sup>151</sup> Parole officers, animated “by and large” with “concern for the client,” were “entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and . . . armed with the power to recommend or even to declare revocation.”<sup>152</sup> A revocation hearing was not like a “criminal trial,” because “the State is represented, not by a prosecutor, but by a parole officer.”<sup>153</sup> Appointing counsel to the parolee would “alter significantly the nature of the proceeding,” since “the State in turn will normally provide its own counsel” and “lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients’ positions and to contest with vigor all adverse evidence and views.”<sup>154</sup> Ultimately, “[t]he role of the hearing body itself, aptly described in *Morrissey* as being ‘predictive and discretionary’” would become “more akin to that of a judge at a trial . . . less attuned to the rehabilitative needs of the individual probationer or parolee.”<sup>155</sup>

Nevertheless, the Court acknowledged that *Morrissey* promised limited procedural rights to parolees and that “the effectiveness of the[se] rights may in some circumstances depend on the use of skills” that “the probationer or parolee is unlikely to possess.”<sup>156</sup> “In some cases,” the Court noted, “the probationer[] or parolee[] . . . can fairly be represented only by a trained advocate.”<sup>157</sup> But because “due process is not so rigid as to require that . . . informality, flexibility, and economy must always be sacrificed,” the Court rejected “a new

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149. *Gagnon* formally addressed probation, not parole, but the Court found no “difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation.” *Id.* at 782, 790.

150. *Id.* at 783.

151. *Id.*

152. *Id.* at 784 (quoting *Morrissey*, 408 U.S. at 477).

153. *Id.* at 789.

154. *Id.* at 787.

155. *Id.* at 787–88.

156. *Id.* at 786–87.

157. *Id.* at 788.

inflexible rule with respect to the requirement of counsel,” and instead concluded “that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority.”<sup>158</sup>

The Supreme Court’s third and final decision on parole revocation came three years later in *Moody v. Daggett*,<sup>159</sup> which addressed the right to a timely revocation hearing.<sup>160</sup> The petitioner there was a federal prisoner convicted of rape on an Indian reservation and sentenced to ten years’ imprisonment, for which he served four before being released on parole.<sup>161</sup> He then shot and killed two people on the reservation, was convicted of homicide in federal court, and sentenced to another ten years’ imprisonment.<sup>162</sup> Committing those homicides also obviously violated the conditions of his parole, so the Parole Commission issued “a parole violator warrant” against him, which it lodged with prison officials as a detainer.<sup>163</sup> The petitioner then asked the Commission to “execute the warrant immediately so that any imprisonment imposed for violation of his earlier parole under the rape conviction could run concurrently with his . . . homicide sentences.”<sup>164</sup> The Commission refused, saying that “it intended to execute the warrant only upon [his] release from his second sentence.”<sup>165</sup> In response, the petitioner filed a federal habeas corpus action challenging the Commission’s refusal to execute the warrant.

The Court affirmed the Commission’s decision, holding that a parolee was not “constitutionally entitled to a prompt parole revocation hearing when a parole violator warrant is issued and lodged with the institution of his confinement.”<sup>166</sup> The Court acknowledged that under *Morrissey*, the parolee had the right to a revocation hearing “within a reasonable time after [he] is taken into custody.”<sup>167</sup> But

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158. *Id.* at 788, 790. The Court added that appointed counsel should be “[p]resumptively” required when the parolee made “a timely and colorable claim” that he had not committed the alleged violation or had “substantial reasons which justified or mitigated the violation or make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.” *Id.*

159. 429 U.S. 78 (1976).

160. *Id.* (holding that issuance of parole violator warrant is not per se deprivation of rights).

161. *Id.* at 80.

162. *Id.*

163. *Id.*

164. *Id.* at 80–81.

165. *Id.* at 81.

166. *Id.* at 79.

167. *Id.* at 87 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972)).

because the petitioner was currently incarcerated for the homicide convictions, not the parole violation, the Court concluded that deferring the hearing did him no harm, and he had no right to object to the delay.<sup>168</sup>

The Court specifically rejected the petitioner's argument that delaying the revocation hearing would harm him by denying him the "opportunity" to serve his sentence for the parole violation concurrently with his sentence for the homicide convictions.<sup>169</sup> Under the parole regulations, the Court noted, the Commission "ha[d] power to grant, retroactively, the equivalent or concurrent sentences and to provide for unconditional or conditional release upon completion of the subsequent sentence."<sup>170</sup> Therefore, "deferral of the revocation decision does not deprive petitioner of any such opportunity."<sup>171</sup>

"Finally," the Court said, there was the "practical aspect to consider."<sup>172</sup> Because the petitioner had pled guilty to two homicides, he also had obviously violated the conditions of his parole, and "the only remaining inquiry is whether continued release is justified notwithstanding the violation."<sup>173</sup> Since this decision was "uniquely a 'prediction as to the ability of the individual to live in society without committing antisocial acts,'" his "institutional record" was "perhaps one of the most significant factors."<sup>174</sup> "Given the predictive nature of the hearing," the Court concluded, it made sense to delay it until the petitioner finished his current sentence, at which point that "prediction" would be "both most relevant and most accurate."<sup>175</sup>

### *B. Supreme Court's Silence on Supervised Release*

In 1984, Congress passed the Sentencing Reform Act, abolishing parole and creating supervised release. Yet between 1984 and 2019, the Supreme Court said almost nothing about how this new system of post-release supervision fit into the nation's constitutional framework. During this time, the Court issued only three minor opinions touching supervised release, all involving technical issues of statutory

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168. *Id.* at 86.

169. *Id.* at 87.

170. *Id.*

171. *Id.*

172. *Id.* at 89.

173. *Id.*

174. *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972)).

175. *Id.*

interpretation.<sup>176</sup> The little the Court did say about supervised release suggested that it served the same rehabilitative function as parole and therefore should be analyzed in the same manner.

The Court's 1991 decision in *Gozlon-Peretz v. United States*<sup>177</sup> addressed how supervised release should apply to defendants who committed their offenses between 1986 (when Congress imposed mandatory minimum terms of supervised release for drug offenses) and 1987 (when the Sentencing Reform Act actually took effect).<sup>178</sup> Based on the statutory text, the Justices concluded that these interim offenders should be subject to the mandatory terms of supervised release.<sup>179</sup> The decision turned entirely on a close reading of the statutes and said virtually nothing about supervised release, though it did note that in contrast to parole, "the sentencing court, rather than the Parole Commission, . . . oversee[s] the defendant's post-confinement monitoring."<sup>180</sup> The opinion also noted cryptically that "[s]upervised release is a unique method of post-confinement supervision invented by Congress for a series of sentencing reforms."<sup>181</sup>

In *United States v. Johnson*,<sup>182</sup> decided in 2000, the Supreme Court suggested a rehabilitative view of supervised release.<sup>183</sup> The question there was whether a defendant who had over-served a prison sentence could have his term of supervised release shortened based on the excess time he spent in prison.<sup>184</sup> Once again relying solely on the statutory language, the Court unanimously held that the answer was no—the defendant had to serve his full term of supervised release beginning on the date he actually left prison.<sup>185</sup> Although the Court found that "the text of [the statute] resolves the case," it also noted that this "conclusion accord[ed] with the statute's purpose and design."<sup>186</sup> "Supervised release fulfills rehabilitative ends, distinct from those

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176. *Johnson v. United States*, 529 U.S. 694 (2000); *United States v. Johnson*, 529 U.S. 53 (2000); *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991).

177. 498 U.S. 395 (1991).

178. *Id.* at 408–09.

179. *Id.* at 399–410.

180. *Id.* at 400–01.

181. *Id.* at 407–08.

182. 529 U.S. 53 (2000).

183. *Id.* at 53–54.

184. *Id.* at 54.

185. *Id.* at 56–59.

186. *Id.* at 59.

served by incarceration,” the Court said, so it would make no sense to “treat[] [a defendant’s] time in prison as interchangeable with his term of supervised release.”<sup>187</sup>

Finally, in the similarly titled *Johnson v. United States*<sup>188</sup> decided the same year, the Supreme Court gave its fullest view to date of supervised release, comparing the system to parole over a strong dissent.<sup>189</sup> This case asked whether a 1994 amendment empowering judges to impose additional terms of supervised release on defendants who had violated their initial terms of supervision applied retroactively.<sup>190</sup> The Court again relied primarily on a textual analysis, holding that regardless of the amendment, pre-1994 statutory language permitted judges to impose the additional terms of supervision.<sup>191</sup>

Having resolved the statutory question, the Supreme Court added that there was “nothing surprising about the consequences of our reading,” since it “serv[ed] the evident congressional purpose . . . in providing for a term of supervised release.”<sup>192</sup> Supervised release was designed to “improve the odds of a successful transition from the prison to liberty,” and therefore judges should be able to impose additional terms of supervision on those offenders who needed it.<sup>193</sup> The Court also noted that supervised release was “closely analogous” to parole, and that it was consistent with parole practice to impose additional supervision on prisoners after their release was revoked.<sup>194</sup>

Justice Scalia dissented, primarily disagreeing with the majority’s statutory analysis, but also criticizing its analogy to parole.<sup>195</sup> Observing that “the Sentencing Reform Act’s adoption of supervised release was meant to make a significant break with prior practice,”<sup>196</sup> he found “the Court’s effort to equate parole and supervised release . . . unpersuasive.”<sup>197</sup> “Unlike parole, which replaced a portion of a defendant’s prison sentence,” he observed, “supervised release is

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187. *Id.* at 59–60.

188. 529 U.S. 694 (2000).

189. *Id.* (holding that district courts have the authority to order terms of supervised release following reimprisonment).

190. *Id.* at 696–98.

191. *Id.* at 701–08.

192. *Id.* at 708–10.

193. *Id.* at 708–09.

194. *Id.* at 710–11.

195. *Id.* at 715–25 (Scalia, J., dissenting).

196. *Id.* at 724–25.

197. *Id.* at 725.

a separate term imposed at the time of initial sentencing.”<sup>198</sup> Ultimately, however, he did not appear particularly invested in this distinction, concluding that “[t]his is not an important case, since it deals with the interpretation of a statute that has been amended to eliminate, for the future, the issue we today resolve.”<sup>199</sup>

*C. Circuit Courts’ Application of Parole Precedents  
to Supervised Release*

Without Supreme Court guidance, the courts of appeals unanimously concluded that supervised release was merely a continuation of the old parole system and therefore governed by the old parole precedents. Many circuit courts simply applied the Supreme Court’s parole precedents to supervised release without analysis.<sup>200</sup> Others specifically held that “[p]arole, probation, and supervised release revocation hearings are constitutionally indistinguishable” and therefore “analyzed in the same manner.”<sup>201</sup> Citing *Morrissey*, *Gagnon*, and *Moody*, the circuit courts concluded that defendants facing revocation of their supervised release were entitled to the same minimal standard of due process as parolees.

The Fourth Circuit’s 1992 decision in *United States v. Copley*<sup>202</sup> is an early example. There, the defendant argued that the district court had violated his right to due process by failing to provide him with an

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198. *Id.*

199. *Id.* at 727.

200. *See, e.g.*, *United States v. Henry*, 852 F.3d 1204, 1206 (10th Cir. 2017) (“[T]he due process guarantees associated with [supervised release] proceedings are ‘minimal.’” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 485, 489 (1972))); *United States v. Sistrunk*, 612 F.3d 988, 991 (8th Cir. 2010) (“When a person is charged with violating a condition of supervised release, he is entitled to minimal due process rights prior to revocation of supervised release.” (citing *Morrissey*, 408 U.S. at 480–82)); *United States v. Gomez-Gonzalez*, 277 F.3d 1108, 1111 (9th Cir. 2002) (“*Morrissey* due process requirements also apply to revocations of supervised release. . . . Like parole . . . fewer constitutional safeguards are needed to protect the conditional liberty interest during supervised release.”); *United States v. Meeks*, 25 F.3d 1117, 1123 (2d Cir. 1994) (“[M]ost of the fundamental constitutional procedural protections that are normally applicable to a criminal prosecution are not required for supervised-release proceedings as a matter of constitutional law.” (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973))); *United States v. Martin*, 984 F.2d 308, 310 (9th Cir. 1993) (“In *Morrissey v. Brewer* . . . the Supreme Court defined certain minimal due process requirements for parole revocation. . . . supervised release revocation[] incorporates these same minimal due process requisites.”).

201. *United States v. Hall*, 419 F.3d 980, 985 n.4 (9th Cir. 2005); *see also* *United States v. McCormick*, 54 F.3d 214, 221 (5th Cir. 1995) (“[T]he same protections granted those facing revocation of parole are required for those facing the revocation of supervised release.”); *United States v. Copeland*, 20 F.3d 412, 414 (11th Cir. 1994) (same).

202. 978 F.2d 829 (4th Cir. 1992).

adequate written explanation of why it had revoked his supervised release.<sup>203</sup> The court of appeals disagreed, citing the reduced constitutional protections for parole revocation under *Gagnon* and *Morrissey*, and holding that “[l]ogic would extend this protection to hearings to revoke supervised release,” since “[s]upervised release and probation differ only in that the former follows a prison term and the latter is in lieu of a prison term.”<sup>204</sup> Other circuit courts later cited this case for the proposition that “[t]he same protections granted those facing revocation of parole are required for those facing the revocation of supervised release.”<sup>205</sup>

Fifteen years later in *United States v. Carlton*,<sup>206</sup> the Second Circuit applied similar reasoning to hold that defendants facing revocation of supervised release had no right to a jury or proof beyond a reasonable doubt.<sup>207</sup> The defendant there challenged the constitutionality of the supervised release system on the ground that “it empower[ed] a district court to revoke his term of supervised release without a jury trial and based on findings that are not proved beyond a reasonable doubt, in violation of his constitutional rights under the Fifth and Sixth Amendments.”<sup>208</sup> The court of appeals rejected this argument by citing *Gagnon* and *Morrissey* and explaining that “the ‘full panoply of rights’ due a defendant in a criminal prosecution does not apply to revocation hearings for parole . . . or for supervised release, [both] of which are virtually indistinguishable for purposes of due process analysis.”<sup>209</sup>

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203. *Id.* at 831.

204. *Id.* at 831 & n.\*.

205. *Copeland*, 20 F.3d at 414 (citing *Copley*, 978 F.2d at 831); *see also McCormick*, 54 F.3d at 221 (“[T]he same protections granted those facing revocation of parole are required for those facing the revocation of supervised release.” (citing *Copeland*, 20 F.3d at 414)).

206. 442 F.3d 801 (2d Cir. 2006).

207. *Id.* at 810.

208. *Id.* at 807. This case was similar to *Haymond* but with one significant difference—the district court was not required to impose a mandatory minimum revocation sentence. *See United States v. Haymond*, 139 S. Ct. 2369, 2383–84 (2019) (“As we have emphasized, our decision is limited to § 3583(k)—an unusual provision enacted little more than a decade ago—and the *Alleyne* problem raised by its five-year mandatory minimum term of imprisonment. . . . Section 3583(e), which governs supervised release revocation proceedings generally, does not contain any similar mandatory minimum triggered by judge-found facts.”).

209. *Carlton*, 442 F.3d at 807 (citation omitted); *see also United States v. Gavilanes-Ocaranza*, 772 F.3d 624, 627 (9th Cir. 2014) (“[R]evocation of supervised release [and] revocation of parole . . . must be analyzed the same way when we consider Sixth Amendment . . . trial by jury claims.”).

In myriad other cases, circuit courts have analogized supervised release to parole in order to deny defendants' constitutional rights. The Fifth Circuit applied *Morrissey* to hold that defendants facing revocation of their supervised release had no rights under the Confrontation Clause, because "[i]n determining the scope of the right to confrontation at revocation hearings, we follow Supreme Court precedent addressing that right in the similar context of parole proceedings."<sup>210</sup> The Eleventh Circuit quoted *Morrissey* in holding that a district court had not violated due process by failing to give a defendant notice that it would hold ambiguous drug tests against him, saying the court did nothing wrong by "engag[ing] in the 'predictive and discretionary' task of revocation sentencing . . . by referencing without prior notice conduct that . . . was 'part of [the defendant's] behavior while on' supervised release."<sup>211</sup> Even when deciding in favor of a defendant in an Ex Post Facto case, the Ninth Circuit noted that "[s]upervised release and parole are virtually identical systems. Under each, a defendant serves a portion of a sentence in prison and a portion under supervision outside prison walls. If a defendant violates the terms of his release, he may be incarcerated once more."<sup>212</sup>

Not only have the courts of appeals applied parole precedents to supervised release, they have also affirmatively rejected arguments attempting to distinguish between them. In *United States v. Frazier*,<sup>213</sup> the Eleventh Circuit held that the Federal Rules of Evidence did not

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210. *United States v. Jimison*, 825 F.3d 260, 263 (5th Cir. 2016); *see also* *United States v. Reese*, 775 F.3d 1327, 1329 (11th Cir. 2015) (holding there is no right to confrontation in supervised release revocation because "courts treat revocations the same whether they involve probation, parole, or supervised release"); *United States v. Kelley*, 446 F.3d 688, 690–91 (7th Cir. 2006) ("*Morrissey* held that due process requires a flexible notice-and-hearing procedure—including a limited right of confrontation—in the revocation context." (citing *Morrissey v. Brewer*, 408 U.S. 471, 488–90 (1972))); *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005) ("Because '[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions' the full protection provided to criminal defendants, including the Sixth Amendment right to confrontation, does not apply to them." (citing *Morrissey*, 408 U.S. at 480)).

211. *United States v. Warren*, 720 F.3d 321, 330 (5th Cir. 2013) (quoting *Morrissey*, 408 U.S. at 480).

212. *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993); *see also* *United States v. Meeks*, 25 F.3d 1117, 1121 (2d Cir. 1994) ("We conclude that for purposes of analyzing the applicable constitutional protections, a charge of supervised-release violation is virtually indistinguishable from a charge of violation of parole."); *United States v. Parriett*, 974 F.2d 523, 526 n.2 (4th Cir. 1992) ("We can find no persuasive reason to distinguish between the standards of parole eligibility . . . and the conditions for revocation of supervised release, at issue in the present case.").

213. 26 F.3d 110 (11th Cir. 1994).



apply to supervised release because they did not apply to parole, and the two systems were “conceptually the same.”<sup>214</sup> The court rebuffed the defendant’s argument that parole differed from supervised release because it was “granted as a matter of grace, and w[as] not supervised by the judicial branch, whereas supervised release is mandatory and is administered by the court.”<sup>215</sup> “Although the administration of supervised release is somewhat different than that of . . . parole,” the court noted, “the purpose and theory of [both] types of release are essentially identical.”<sup>216</sup>

The Fourth Circuit similarly denied any distinction between the two systems in *United States v. Armstrong*,<sup>217</sup> holding that the exclusionary rule did not apply to supervised release revocations because it did not apply to parole.<sup>218</sup> The court firmly rejected the defendant’s attempt to differentiate supervised release from parole, declaring that “parole and supervised release are not just analogous, but virtually indistinguishable.”<sup>219</sup> “Although supervised release revocation proceedings, unlike parole revocation hearings, do take place before a judge,” the court noted, “they are characterized by the same ‘flexibility’” as parole hearings.<sup>220</sup>

Despite this overwhelming consensus, it is worth noting that a few judges have reached a different conclusion about the relationship between parole and supervised release. In his *Johnson* dissent, Justice Scalia stressed the “break” that occurred when Congress replaced parole with supervised release,<sup>221</sup> and Judge Posner of the Seventh Circuit emphasized their differences in a decision criticizing “judicial insouciance” in the imposition of supervised release.<sup>222</sup> He reasoned:

Parole shortens prison time, substituting restrictions on the freed prisoner. Supervised release does not shorten prison time; instead it imposes restrictions on the prisoner to take effect upon his release from prison. Parole mitigates punishment; supervised release augments it—most

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214. *Id.* at 113.

215. *Id.* at 113 n.2.

216. *Id.*

217. 187 F.3d 392 (4th Cir. 1999).

218. *Id.* at 393 (citing *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998)).

219. *Id.* at 394.

220. *Id.*

221. *Johnson v. United States*, 529 U.S. 694, 724–25 (2000) (Scalia, J., dissenting).

222. *United States v. Siegel*, 753 F.3d 705, 711 (7th Cir. 2014) (Posner, J.); *see also* *United States v. Thompson*, 777 F.3d 368, 372 (7th Cir. 2015) (Posner, J.).

dramatically when the defendant, having been determined to have violated a condition or conditions of supervised release, is given, as punishment, a fresh term of imprisonment.<sup>223</sup>

While a few other judges have also pointed out differences between supervised release and parole, these observations have not made any impact in the realm of constitutional law.<sup>224</sup> Indeed, despite Judge Posner's decisions, the rule in the Seventh Circuit remains that "*Morrissey* . . . sets out the due process requirements for purposes of supervised release revocation hearings."<sup>225</sup>

#### *D. Supreme Court Breaks Its Silence on Supervised Release*

The Supreme Court finally broke its long silence on supervised release in 2019 with a 4–1–4 decision in *United States v. Haymond*.<sup>226</sup> Fractured into a four-vote plurality and a single-Justice concurrence, a majority of the Court concluded that one provision of the supervised release statute violated the defendant's Fifth and Sixth Amendment right to a jury trial.<sup>227</sup> Although all the Justices acknowledged that supervised release differed from parole insofar as it added to the sentence rather than reducing it, they disagreed vigorously about the constitutional significance of this distinction.<sup>228</sup>

*Haymond* concerned the constitutionality of section 3583(k), title 18 of the United States Code, a provision of the supervised release statute enacted in 2003 that imposed a five-year minimum sentence on sex offenders who violated their supervised release by committing another sex offense.<sup>229</sup> The petitioner had been convicted of possessing child pornography and sentenced to thirty-eight months'

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223. *Thompson*, 777 F.3d. at 372.

224. *See* *United States v. Trotter*, 321 F. Supp. 3d 337, 346–47 (E.D.N.Y. 2018); *see also* *United States v. King*, 891 F.3d 868, 870 (9th Cir. 2018).

225. *United States v. Neal*, 512 F.3d 427, 435 (7th Cir. 2008).

226. *United States v. Haymond*, 139 S. Ct. 2369 (2019) (holding "federal statute governing revocation of supervised release, authorizing a new mandatory minimum sentence based on a judge's fact-finding by a preponderance of the evidence, violated the Due Process Clause and the Sixth Amendment right to jury trial, as applied"). The Supreme Court also issued another technical decision on supervised release, holding that a term of supervision is tolled while a defendant is held in pretrial detention for a new criminal offense, so long as he later receives credit for that period of detention as time served on the new offense. *See* *Mont v. United States*, 139 S. Ct. 1826 (2019) (interpreting 18 U.S.C. § 3624(c)).

227. *Haymond*, 139 S. Ct. at 2382.

228. *Id.* at 2379, 2386.

229. *Id.* at 2374.

imprisonment followed by ten years' supervised release.<sup>230</sup> He completed his prison sentence and began his term of supervision, but was eventually found with more child pornography on his computers and cellphone.<sup>231</sup> The government sought to revoke his supervised release and send him back to prison.<sup>232</sup> At the revocation hearing, the district court concluded "under a preponderance of the evidence rather than a reasonable doubt standard" that the defendant had knowingly downloaded and possessed thirteen of the images, but found "insufficient evidence" to show that he had knowingly accessed the remaining forty-six images.<sup>233</sup> The court described the five-year minimum sentence as excessive and even "repugnant," but was compelled to impose it on the defendant, stating that "[w]ere it not for [the] mandatory minimum . . . he 'probably would have sentenced in the range of two years or less.'"<sup>234</sup>

The Supreme Court held that the five-year mandatory minimum violated the defendant's Fifth and Sixth Amendment right to a jury trial.<sup>235</sup> The plurality opinion, authored by Justice Gorsuch, described this conclusion as a "clear" application of the Court's prior decisions in *Apprendi v. New Jersey* and *Alleyne v. United States*.<sup>236</sup> *Apprendi* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>237</sup> *Alleyne* extended this rule to facts that increased the statutory mandatory minimum sentence.<sup>238</sup> Section 3583(k) violated *Apprendi* and *Alleyne*, because it allowed "judicial factfinding" to "trigger[] a new punishment in the form of a prison term of at least five years and up to life."<sup>239</sup>

In reaching this conclusion, Justice Gorsuch specifically rejected the government's argument that "[section] 3583(k)'s supervised release revocation procedures are practically identical to historic parole and probation revocation procedures," which *Morrissey* and

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230. *Id.* at 2373.

231. *Id.* at 2374.

232. *Id.*

233. *Id.*

234. *Id.* at 2375.

235. *See id.* at 2378–79; *id.* at 2386 (Breyer, J., concurring).

236. *Id.* at 2381.

237. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

238. *Alleyne v. United States*, 570 U.S. 99, 112 (2013).

239. *Haymond*, 139 S. Ct. at 2378 (plurality opinion) (citing *Alleyne*, 570 U.S. at 115).

*Gagnon* found “to comport with the Fifth and Sixth Amendments.”<sup>240</sup> That comparison, he said, “overlook[ed] a critical difference between [section] 3583(k) and traditional parole and probation practices.”<sup>241</sup> Under parole, the defendant was released early from his prison sentence, and if he violated a condition, was sent back to prison “to serve *only* the remaining prison term authorized by statute for his original crime of conviction.”<sup>242</sup> But “[a]ll that changed beginning in 1984” when “Congress overhauled federal sentencing procedures to make prison terms more determinate and abolish the practice of parole.”<sup>243</sup> Now, the defendant must serve his prison sentence in full, followed by a term of supervised release “to encourage rehabilitation *after* the completion” of the prison term.<sup>244</sup>

This difference “bears constitutional consequences,” Justice Gorsuch explained, because parole violations “generally exposed a defendant only to the *remaining* prison term authorized for his crime of conviction,” while supervised release violations may “expose a defendant to an additional . . . prison term well *beyond* that authorized by the jury’s verdict.”<sup>245</sup> Furthermore, he noted, section 3583(k) “differs . . . not only from parole and probation,” but also “from the supervised release practices that . . . govern most federal criminal proceedings today,” since “[u]nlike all those procedures, [section] 3583(k) alone requires a substantial increase in the minimum sentence to which a defendant may be exposed.”<sup>246</sup> Therefore, section 3583(k), “offends the Fifth and Sixth Amendments’ ancient protections,” while parole revocation did not.<sup>247</sup>

Justice Breyer concurred in the judgment. He opposed applying *Apprendi* to supervised release because of “potentially destabilizing consequences.”<sup>248</sup> Nevertheless, he concluded that section 3583(k) violated the right to a jury trial because it functioned “less like ordinary revocation and more like punishment for a new offense” by targeting a “discrete set of federal criminal offenses” and “imposing a

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240. *Id.* at 2381 (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) and *Morrissey v. Brewer*, 408 U.S. 471 (1972)).

241. *Id.*

242. *Id.* at 2382.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* at 2385 (Breyer, J., concurring).

mandatory minimum term of imprisonment.”<sup>249</sup> Justice Breyer emphasized, however, that parole and supervised release revocations were otherwise comparable, asserting that “the role of the judge in a supervised-release proceeding is consistent with traditional parole” and “Congress did not intend the system of supervised release to differ from parole in this respect.”<sup>250</sup>

Justice Alito dissented, castigating the plurality opinion as “not based on the original meaning of the Sixth Amendment . . . irreconcilable with precedent, and sport[ing] rhetoric with potentially revolutionary implications.”<sup>251</sup> Based on a lengthy historical and linguistic analysis of the Sixth Amendment’s jury trial clause, he concluded that supervised release revocation was not a “criminal prosecution” and therefore *Apprendi* and *Alleyne* did not apply.<sup>252</sup>

Justice Alito also disputed the plurality’s distinction between parole and supervised release. While he acknowledged that parole cut short a prison sentence and supervised release adds to it, he insisted that “this difference is purely formal and should have no constitutional consequences.”<sup>253</sup> Far from distinctive, he suggested, supervised release is the “substantive equivalent” of parole.<sup>254</sup>

Here is an example: A pre-SRA sentence of nine years’ imprisonment meant three years of certain confinement and six years of possible confinement depending on the defendant’s conduct in the outside world after release from prison. At least for present purposes, such a sentence is the substantive equivalent of a post-SRA sentence of three years’ imprisonment followed by six years of supervised release. In both situations, the period of certain confinement (three years) and the maximum term of possible confinement (nine years) are the same.<sup>255</sup>

“Once this is understood,” Justice Alito concluded, “it follows that the procedures that must be followed at a supervised-release revocation proceeding are the same that had to be followed at a parole revocation

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249. *Id.* at 2386.

250. *Id.* at 2385.

251. *Id.* at 2386 (Alito, J., dissenting).

252. *See id.* at 2392–2400.

253. *Id.* at 2388.

254. *Id.* at 2390.

255. *Id.*

proceeding, and these were settled long ago” in *Gagnon* and *Morrissey*.<sup>256</sup>

#### IV. SUPERVISED RELEASE IS NOT PAROLE

*Haymond* marks the first time the Supreme Court recognized a distinction between parole and supervised release: parole shortened prison time, whereas supervised release is imposed in addition to a prison sentence.<sup>257</sup> The Justices disagreed sharply about the constitutional significance of this distinction, but compared to past precedents, their opinions still offer a clearer view of the relationship between parole and supervised release. Nevertheless, the Justices also overlooked other important distinctions between parole and supervised release, which have significant consequences for the constitutional law of community supervision. In fact, there are *three* important differences between parole and supervised release:

- Parole was a relief from punishment, while supervised release is an additional penalty.
- Parole revocation was rehabilitative, while supervised release revocation is punitive.
- Parole was run by an administrative agency, while supervised release is controlled by district courts.

Because of these differences, the Supreme Court’s parole revocation precedents do not apply to supervised release. Instead, defendants on supervised release deserve more procedural protections before their release is revoked.

##### A. Relief Versus Penalty

The clearest difference between parole and supervised release is that parole was a relief from punishment, whereas supervised release is an additional penalty. Justice Gorsuch noted in *Haymond* that “unlike parole, supervised release wasn’t introduced to replace a portion of the defendant’s prison term,” but rather to run “*after* the completion of his prison term.”<sup>258</sup> Justice Alito also recognized this distinction, although he said it was “purely formal and should have no

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256. *Id.* at 2391 (citing *Morrissey v. Brewer*, 408 U.S. 471, 488–89 (1972) and *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.5 (1973)).

257. Years before *Haymond*, Justice Scalia made the same observation in dissent. See *Johnson v. United States*, 529 U.S. 694, 725 (2000) (Scalia, J., dissenting).

258. *Haymond*, 139 S. Ct. at 2382 (plurality opinion).

constitutional consequences.”<sup>259</sup> But because the Justices focused on the technical application of the *Apprendi* rule, they did not consider how this difference affected the broader due-process balancing analysis from *Morrissey*. Because the balance of interests under supervised release favors defendants rather than the government, defendants deserve more procedural protections than parolees before their release is revoked.

*Morrissey*’s balancing of interests for parole revocations depended on parole’s unique nature as a relief from punishment. The Court described parole supervision fundamentally as an exchange between the government and the parolee—the government gave the parolee an enormous benefit by releasing him early from an otherwise lawful prison sentence, and in return, the parolee promised to comply with “many restrictions not applicable to other citizens.”<sup>260</sup> Despite those restrictions, this bargain substantially benefited the parolee, “enabl[ing] him to do a wide range of things open to persons who have never been convicted of any crime.”<sup>261</sup> Because the government had taken a “risk” by releasing the parolee early, it had an “overwhelming interest” in being able to revoke his parole without a full criminal trial.<sup>262</sup> And because the parolee’s liberty was “properly dependent on observance of special parole restrictions,” he had a weaker interest in fighting revocation.<sup>263</sup>

But this logic does not translate to supervised release. Because the defendant is no longer granted early release from prison, the term of post-release supervision no longer reflects an exchange between him and the government. Instead, the defendant must serve his prison term in full, followed by an additional term of supervised release. The government takes no “risk,” because it does not release the defendant early, and the defendant’s freedom is not granted to him “dependent on observance of special parole restrictions,” but rather earned after full service of a prison sentence.<sup>264</sup> This difference shifts the balance of interests between the defendant and the government, giving the defendant a stronger interest in fighting revocation, and the government a weaker interest in avoiding a full criminal trial.

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259. *Id.* at 2388 (Alito, J., dissenting).

260. *Morrissey*, 408 U.S. at 482.

261. *Id.*

262. *Id.* at 483.

263. *Id.* at 480.

264. *Id.*

Indeed, as District Judge Jack Weinstein of the Eastern District of New York has observed, using the word “revoke” in reference to supervised release is “somewhat of a misnomer.”<sup>265</sup> He explained:

Parole was based on early release from prison—by the grace of the parole board a person was conditionally released from prison, and the leniency could be “revoked.” A person on supervised release has completed his or her prison term and is serving an independent term of supervision separately ordered by the court. Supervised release is not being “revoked”; rather, a supervisee is being punished for violating conditions.<sup>266</sup>

Justice Kavanaugh put it similarly at the *Haymond* oral argument: “Revocation of parole seems to me seems like a denied benefit, whereas revocation of supervised release seems like a penalty.”<sup>267</sup>

Another way the relief/penalty distinction affects the constitutional analysis is in changing the timing of when conditions of release are imposed. The Parole Commission set parole conditions at the same time that it released the parolee from prison, using his institutional record as “one of the most significant factors” in its decision.<sup>268</sup> Parole violations were therefore considered a sign that the defendant was “not adjusting properly and [could not] be counted on to avoid antisocial activity.”<sup>269</sup>

Conditions of supervised release, by contrast, are imposed by the district judge at sentencing—before the defendant begins the prison term, and long before he will return to the community. Therefore, the judge must “guess at the time of sentencing what conditions are likely to make sense in what may be the distant future.”<sup>270</sup> As a result, “many district judges simply list the conditions that they impose, devoting

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265. *United States v. Trotter*, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018).

266. *Id.* at 346–47.

267. Transcript of Oral Argument at 32, *United States v. Haymond*, 139 S. Ct. 2369 (2019) (No. 17-1672).

268. *Moody v. Daggert*, 429 U.S. 78, 89 (1976); *see also* *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 15 (1979) (“The behavior record of an inmate during confinement is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release.”).

269. *Morrissey*, 408 U.S. at 479.

270. *United States v. Thompson*, 777 F.3d 368, 374 (7th Cir. 2015). While conditions of release can be changed after imposition, “modification is a bother for the judge, especially when, as must be common in cases involving very long sentences, modification becomes the responsibility of the sentencing judge’s successor.” *United States v. Siegel*, 753 F.3d 705, 708 (7th Cir. 2014) (Posner, J.).



little or no time at sentencing to explaining them or justifying their imposition.”<sup>271</sup> The empirical evidence shows that in most cases, judges are not “making any reasoned prediction, and instead are simply putting everybody on supervised release,” imposing conditions “without any apparent consideration of either an individual’s risk to public safety or his or her rehabilitation needs.”<sup>272</sup>

Because supervised release conditions are imposed without the same reflection or evidentiary foundation as parole conditions, violations are less likely to be warning signs of antisocial conduct. Technical violations in particular—missed appointments, positive drug tests, breached curfews, etc.<sup>273</sup>—are not necessarily signs that the defendant is failing to adjust to the community. These conditions are selected long before the defendant’s release from prison, without a fully informed judgment of what is necessary to ensure a successful return to the community. The government therefore has a weaker interest in punishing supervised release violations, and the defendant a stronger claim to his liberty.

### *B. Rehabilitation Versus Punishment*

Another important difference between parole and supervised release is that parole revocation was rehabilitative, while supervised release revocation is punitive. None of the opinions in *Haymond* recognized this distinction, with the plurality asserting that supervised release serves to “encourage rehabilitation,”<sup>274</sup> and the dissent claiming that it ensures defendants are “sufficiently reformed” and “able to lead a law-abiding life.”<sup>275</sup> The circuit courts have similarly applied parole precedents to supervised release by emphasizing their shared rehabilitative character,<sup>276</sup> citing the legislative history of the Sentencing Reform Act as evidence that supervised release “fulfills rehabilitative ends.”<sup>277</sup> In reality, however, supervised release

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271. *Thompson*, 777 F.3d at 373.

272. Scott-Hayward, *supra* note 10, at 183, 216.

273. See U.S. SENTENCING GUIDELINES MANUAL § 5D1.3(a)(4) & (7), (c)(1)–(6), (d)(4) (U.S. SENTENCING COMM’N 2018).

274. *United States v. Haymond*, 139 S. Ct. 2369, 2382 (2019).

275. *Id.* at 2389 (Alito, J., dissenting).

276. See, e.g., *United States v. Davis*, 711 F.3d 174, 177–78 (D.C. Cir. 2013); *United States v. Buchanan*, 638 F.3d 448, 451 (4th Cir. 2011); *United States v. Engelhorn*, 122 F.3d 508, 511 (8th Cir. 1997).

277. See, e.g., *United States v. Johnson*, 529 U.S. 53, 59 (2000) (“Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills

revocation is far more punitive than parole revocation, entitling defendants to more procedural protections before their release is revoked.

On the most basic level, parole encouraged rehabilitation by promising to reduce punishment, while supervised release does not. From the beginnings of Maconochie's mark system, the promise of early release was meant to reform criminal offenders by encouraging their good behavior. Supervised release, however, is added to a prison sentence, not deducted from it. No matter how the prisoner behaves, he will have to serve his term of imprisonment in full, followed by his term of supervised release.

More broadly, parole revocation was governed by a rehabilitative theory of punishment, which supervised release revocation officially excludes. Parole was rooted in a "medical" theory of imprisonment that viewed offenders as "sick" and needing to be "cured" through incarceration.<sup>278</sup> Parole conditions were meant to guide the parolee's "restoration . . . into normal society,"<sup>279</sup> with violations signaling that the parolee was "not adjusting properly"<sup>280</sup> and needed more "treatment" in prison.<sup>281</sup> Yet the Sentencing Reform Act rejected the medical model of imprisonment, instructing district judges to "consider the specified rationales of punishment *except for* rehabilitation," which they must "acknowledge as an unsuitable justification for a prison term."<sup>282</sup> While the Parole Commission based revocation decisions on rehabilitative concerns, judges are affirmatively prohibited from taking these considerations into account when they revoke supervised release.<sup>283</sup>

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rehabilitative ends . . . . '[T]he primary goal of supervised release is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.'" (quoting S. REP. NO. 98-225, at 124 (1983)); *see also* United States v. Aldeen, 792 F.3d 247, 252 (2d Cir. 2015) (quoting same); United States v. Pierce, 75 F.3d 173, 177 (4th Cir. 1996) (quoting same).

278. Dershowitz, *supra* note 81, at 128.

279. Morrissey v. Brewer, 408 U.S. 471, 478 (1972).

280. *Id.* at 479.

281. Dershowitz, *supra* note 81, at 128.

282. Tapia v. United States, 564 U.S. 319, 327 (2011) (interpreting 18 U.S.C. § 3582(a)). Indeed, the Act did not even give courts the ability to ensure that the defendants they sentenced received rehabilitative services in prison. *Id.* at 330.

283. Initially, this rule did not affect defendants on supervised release, because the Act did not include a revocation mechanism. *See* Biderman & Sands, *supra* note 10, at 204. In 1986, however, Congress added a provision for revoking supervised release, and the circuit courts have since

In addition to excluding rehabilitation, the circuit courts have also held that judges should revoke supervised release for primarily retributive reasons. Although the Sentencing Reform Act omitted “just punishment” as a factor for judges to consider when revoking supervised release,<sup>284</sup> a majority of the courts have nevertheless concluded that “consideration of the gravity of the violation of supervised release . . . is not prohibited,” because the statute does not expressly “foreclose a court from considering ‘other pertinent factors,’ such as . . . ‘the seriousness of the offense.’”<sup>285</sup> Emphasizing a punitive element that the statute itself omits, the courts now declare that “revocation sentences are . . . intended to ‘sanction,’ or, analogously, to ‘provide just punishment for the offense’ of violating supervised release.”<sup>286</sup> Justice Breyer’s concurrence in *Haymond* endorsed this view: “The consequences that flow from violation of the conditions of supervised release are first and foremost considered *sanctions* for the defendant’s . . . failure to follow the court-imposed conditions.”<sup>287</sup> The Sentencing Guidelines include the same instruction, stating that courts should revoke supervised release to “sanction primarily the defendant’s breach of trust, while taking into account . . . the seriousness of the underlying violation and the criminal history of the violator.”<sup>288</sup>

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unanimously concluded that the prohibition on considering rehabilitation also applies to revocation. See *United States v. Schonewolf*, 905 F.3d 683, 690 (3d Cir. 2018); *United States v. Vandergrift*, 754 F.3d 1303, 1309 (11th Cir. 2014); *United States v. Lifshitz*, 714 F.3d 146, 150 (2d Cir. 2013); *United States v. Garza*, 706 F.3d 655, 657–59 (5th Cir. 2013); *United States v. Deen*, 706 F.3d 760, 765–67 (6th Cir. 2013); *United States v. Bennett*, 698 F.3d 194, 197–98 (4th Cir. 2012); *United States v. Mendiola*, 696 F.3d 1033, 1041–42 (10th Cir. 2012); *United States v. Taylor*, 679 F.3d 1005, 1006–07 (8th Cir. 2012); *United States v. Grant*, 664 F.3d 276, 280–81 (9th Cir. 2011); *United States v. Molignaro*, 649 F.3d 1, 2–5 (1st Cir. 2011) (Souter, J., by designation).

284. See 18 U.S.C. §§ 3553(a)(2), 3583(e)(3) (2012).

285. *United States v. Young*, 634 F.3d 233, 238 (3d Cir. 2011); see also *United States v. Phillips*, 791 F.3d 698, 701 (7th Cir. 2015); *United States v. Webb*, 738 F.3d 638, 641–42 (4th Cir. 2013); *United States v. Vargas-Dávila*, 649 F.3d 129, 131–32 (1st Cir. 2011); *United States v. Lewis*, 498 F.3d 393, 400 (6th Cir. 2007); *United States v. Williams*, 443 F.3d 35, 47–48 (2d Cir. 2006). But see *United States v. Miller*, 634 F.3d 841, 844 (5th Cir. 2011) (judge may not consider punishment in revoking release); *United States v. Miquel*, 444 F.3d 1173, 1181–83 (9th Cir. 2006) (“In sum, at a revocation sentencing, a court may appropriately sanction a violator for his ‘breach of trust,’ but may not punish him for the criminal conduct underlying the revocation.”).

286. *Lewis*, 498 F.3d at 400; see also *Biderman & Sands*, *supra* note 10, at 206 (“There is no real distinction between what the [Sentencing] Commission calls the breach of trust and the seriousness of the underlying violation. The releasee is punished for the new conduct with additional time added on to reflect the criminal history.”).

287. *United States v. Haymond*, 139 S. Ct. 2369, 2386 (2019) (Breyer, J., concurring) (emphasis added).

288. U.S. SENTENCING GUIDELINES MANUAL § 7A3(b) (U.S. SENTENCING COMM’N 2018).

Finally, Congress made supervised release harsher and more expansive through a series of amendments in the late 1980s, 1990s, and 2000s. Although supervised release was originally designed to provide transitional support only for defendants in need, courts now impose a term of supervision in virtually all eligible cases.<sup>289</sup> While the system was supposed to ease return to the community, courts now impose more conditions of release,<sup>290</sup> revoke release more often, and revoke release more frequently for technical infractions.<sup>291</sup> “What was originally designed to assist re-integration into the community,” instead is “facilitating reincarceration.”<sup>292</sup>

The punishing character of supervised release revocation stands in stark contrast to the rehabilitative logic underlying the Supreme Court’s parole revocation precedents. *Morrissey*, *Gagnon*, and *Moody* all repeatedly invoked parole’s beneficent purpose when limiting parolees’ constitutional rights, stressing that the system had a “rehabilitative rather than punitive focus.”<sup>293</sup> Parole officials could be trusted because “by and large concern for the client dominates [their] professional attitude.”<sup>294</sup> Parole revocations needed to be informal because “[t]he objective is to return a prisoner to a full family and community life,” and the inquiry was “not purely factual but also predictive and discretionary.”<sup>295</sup> And making parole revocations too procedural would actually harm parolees by making the hearing “less attuned to the rehabilitative needs of the individual.”<sup>296</sup> Because supervised release revocations exclude rehabilitative considerations and instead focus on punishment, these justifications for reduced constitutional protections do not apply. Defendants on supervised

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289. U.S. SENTENCING COMM’N, *supra* note 120, at 4, 49–50.

290. *See* Petersilia, *supra* note 49, at 507.

291. *See* Wooten, *supra* note 104, at 185; *see also* U.S. SENTENCING COMM’N, *supra* note 120, at 68 (“[T]echnical violations accounted for the majority (51.6 percent) of all violations from 2005 to 2008.”); Doherty, *supra* note 10, at 1016 (“In any one year, roughly sixty percent of revocations are for non-criminal conduct.”); Whiteside, *supra* note 10, at 211 (“Approximately one-half of the districts report that there are more revocation actions than in the past.”).

292. Biderman & Sands, *supra* note 10, at 204.

293. *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973).

294. *Id.* at 783–84.

295. *Morrissey v. Brewer*, 408 U.S. 471, 495, 480 (1972); *see also* *Moody v. Dagget*, 429 U.S. 78, 89 (1976) (requiring the Parole Commission to convene prompt revocation hearings would impede its “prediction as to the ability of the individual to live in society without committing antisocial acts”).

296. *Gagnon*, 411 U.S. at 787–88.

release are therefore entitled to more procedural rights than parolees before their release is revoked.

### C. Agency Versus Courts

The third and final difference between parole and supervised release is that parole was run by an agency—the Parole Commission—while supervised release is controlled by district courts. The Supreme Court acknowledged this distinction in *Gozlon-Peretz*, noting that “the sentencing court, rather than the Parole Commission, . . . oversee[s] the defendant’s postconfinement monitoring.”<sup>297</sup> In his *Haymond* concurrence, however, Justice Breyer made the surprising claim that “the role of the judge in a supervised-release proceeding is consistent with traditional parole” and “Congress did not intend the system of supervised release to differ from parole in this respect.”<sup>298</sup> That comparison is hard to square with the significant differences between the Parole Commission and district courts.<sup>299</sup> While the Supreme Court’s parole precedents emphasized the need for flexibility in administrative hearings, judicial proceedings are more amenable to protecting defendants’ procedural rights.

The Supreme Court strived to avoid adding procedural rules to parole revocations because it feared that they would “alter significantly the nature of the proceeding,” by changing “[t]he role of the hearing body . . . [into] that of a judge at a trial.”<sup>300</sup> The Court warned that making revocation proceedings too procedural might actually disadvantage the parolee, since “[i]n the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation.”<sup>301</sup>

The Court also stressed that in a parole revocation, the government was not represented by a prosecutor, but by a parole officer, who “recognizes his double duty to the welfare of his clients

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297. *Gozlon-Peretz v. United States*, 498 U.S. 395, 400–01 (1991).

298. *United States v. Haymond*, 139 S. Ct. 2369, 2385 (2019) (Breyer, J., concurring).

299. When a special study committee recommended in 1990 that jurisdiction over supervised release be transferred to a specialized agency like the Parole Commission, the Judicial Conference of the United States opposed the idea. Adair, *supra* note 10.

300. *Gagnon*, 411 U.S. at 787; *see also* *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 8 (1979) (saying that parole decisions “[differ] from the traditional mold of judicial decisionmaking in that the choice involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker”).

301. *Gagnon*, 411 U.S. at 788.

and to the safety of the general community,” and views revocation “as a failure of supervision.”<sup>302</sup> Because of this professional attitude, “he has been entrusted traditionally with broad discretion to judge” the parolee and “armed with the power to recommend or even to declare revocation.”<sup>303</sup> The Court emphasized that “[c]ontrol over the required proceedings by the hearing officers can assure that delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur.”<sup>304</sup>

Supervised release revocations, by contrast, are held in district court, and therefore by definition are before “a judge at a trial.”<sup>305</sup> They are also deeply adversarial because the defendant has a statutory right to counsel and the United States Attorney’s Office represents the government.<sup>306</sup> Indeed, federal prosecutors now play a prominent role at revocation hearings:

At the hearing, the United States Attorney prosecutes the petition, that is, calls witnesses and presents evidence in support of the allegations of violation in the petitions. The probation officer sits separately from the United States Attorney, and her participation in the guilt-or-innocence phase of the proceeding is limited to being a sworn witness, if she is called either by the United States Attorney, the defendant, or the court. At the hearing, the probation officer makes no presentation or recommendation as to the guilt or innocence of the defendant; only the defendant or his attorney and the United States Attorney argue the defendant’s guilt or innocence.<sup>307</sup>

Unlike probation officers, federal prosecutors are trained to obtain convictions and long sentences. They have no “duty” to the defendant and do not view revocation as a “failure” of their own work.<sup>308</sup>

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302. *Id.* at 783, 785 (quoting FRANK J. REMINGTON ET AL., CRIMINAL JUSTICE ADMINISTRATION, MATERIALS & CASES, 910–11 (1969).

303. *Id.* at 784.

304. *Morrissey v. Brewer*, 408 U.S. 471, 489–90 (1972).

305. *Cf. Gagnon*, 411 U.S. at 787–88 (explaining that parole revocations require flexibility so as not to turn the hearing body into “a judge at a trial”).

306. *See* 18 U.S.C. § 3006A(b) (2012); FED. R. CRIM. P. 32.1(a)(3)(B).

307. *United States v. Burnette*, 980 F. Supp. 1429, 1434 (M.D. Ala. 1997); *see also* 18 U.S.C. § 3603(8)(B) (2012) (requiring probation officers to report supervised-release violations “to the Attorney General or his designee”).

308. *Cf. Gagnon*, 411 U.S. at 783–85 (explaining that probation officers have a duty to their clients and treat revocation as a failure of supervision).

Revocation decisions are also no longer informed by the expert judgment of the Parole Commission and its “administrative officers,” to whom the Supreme Court gave “broad discretion.”<sup>309</sup> Instead, district judges make decisions to revoke supervised release based on the recommendation of “a single probation officer,”<sup>310</sup> who does not disclose “the scientific basis (if there is a scientific basis) of his recommendation . . . in his presentence report.”<sup>311</sup> The role of the probation office has changed as well, as a shrinking number of officers have been asked to supervise more and more offenders,<sup>312</sup> leading them to “spend disproportionate time on enforcement (that is, investigating violations . . . and recommending punishments)” with “little time left over for suggesting appropriate conditions and helping the probationer to comply with them.”<sup>313</sup>

Providing constitutional protections for defendants in these trial-like proceedings will not “alter significantly the[ir] nature.”<sup>314</sup> Given the participation of United States Attorney’s Offices and district court judges, these proceedings are already just as adversarial as criminal trials, and defendants deserve similar constitutional rights. Indeed, as *Gagnon* predicted, moving supervised release revocations into district courts has placed defendants at a systematic disadvantage, as prosecutors and judges are harsher than probation officers and parole boards.<sup>315</sup> To ensure a fair shot to defendants facing revocation of their supervised release, they need more procedural protection than parolees.

## V. THE RIGHT TO A TIMELY REVOCATION HEARING

*Haymond* addressed the right to a jury trial, but a full understanding of the relationship between parole and supervised release should impact many areas of constitutional law. Indeed, the

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309. *Id.* at 784; *Morrissey*, 408 U.S. at 479, 486.

310. *United States v. Siegel*, 753 F.3d 705, 710–11 (7th Cir. 2014).

311. *Id.*

312. Judge Posner estimated that each probation officer now supervises thirty-six people. *Id.* at 710.

313. *United States v. Thompson*, 777 F.3d 368, 374 (7th Cir. 2015); *see also* Petersilia, *supra* note 49, at 483 (“[P]arole has historically provided job assistance, family counseling, and chemical dependency programs . . . . But punitive public attitudes, combined with diminishing social service resources, have resulted in fewer services provided.”).

314. *Cf. Gagnon*, 411 U.S. at 787 (explaining that “the introduction of counsel” into a parole revocation “will alter significantly the nature of the proceeding”).

315. *See id.* at 787–88.

circuit courts have applied parole precedents to deny defendants on supervised release myriad constitutional rights under the Fourth, Fifth, and Sixth Amendments, as well as the Ex Post Facto Clause and the Federal Rules of Evidence.<sup>316</sup> In light of the significant differences between parole and supervised release outlined above, all these decisions should be reconsidered.

One constitutional protection that is especially important to reconsider is the right to a timely revocation hearing. Protection against undue delay is among the oldest rights in Anglo-American law, dating back to the Magna Carta and enshrined in the Sixth Amendment's Speedy Trial Clause.<sup>317</sup> It is unique among procedural rights in that it not only shields the innocent but also the guilty from the "anxiety and concern" of long delay, as well as the "societal interest" in efficient justice.<sup>318</sup> The right to a timely hearing is particularly vital in proceedings to revoke supervised release, because the defendant will by definition have at least one prior conviction that is a basis for denying him bail.<sup>319</sup> Furthermore, "[t]he burden of administering [supervised release] is heavy" and revocation proceedings are easily brushed off as low scheduling priorities by courts and attorneys.<sup>320</sup>

Perhaps most importantly, protection against undue delay preserves the defendant's ability to seek "imposition of a concurrent sentence" and reduce his total term of imprisonment.<sup>321</sup> The typical fact pattern arises when a person under supervision is arrested and

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316. See, e.g., *United States v. Carlton*, 442 F.3d 802, 807, 811 (2d Cir. 2006) (Fifth and Sixth Amendments); *United States v. Hall*, 419 F.3d 980, 985 (9th Cir. 2005) (Sixth Amendment); *United States v. Armstrong*, 187 F.3d 392, 393–94 (4th Cir. 1999) (Fourth Amendment); *United States v. Frazier*, 26 F.3d 110, 114 (11th Cir. 1994) (Federal Rules of Evidence); *United States v. Copley*, 978 F.2d 829, 831–32 (4th Cir. 1992) (Fifth Amendment). But see *United States v. Meeks*, 25 F.3d 1117, 1122 (2d Cir. 1994) (Ex Post Facto); *United States v. Paskow*, 11 F.3d 873, 881 (9th Cir. 1993) (Ex Post Facto); *United States v. Parriett*, 974 F.2d 523, 526 n.2 (4th Cir. 1992) (Ex Post Facto).

317. *Klopfert v. North Carolina*, 386 U.S. 213, 223–26 (1967); WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 858–59 (July 2004); see U.S. CONST. amend. VI.

318. See *Barker v. Wingo*, 407 U.S. 514, 519–20, 532–33 (1972).

319. See 18 U.S.C. § 3142(g)(3)(B) (2012).

320. Wooten, *supra* note 104, at 185; see also Stover, *supra* note 10, at 196–97.

321. *Carchman v. Nash*, 473 U.S. 716, 733–34 (1985) (Breyer, J., concurring); see also *Smith v. Hooey*, 393 U.S. 374, 378 (1969) ("[T]he possibility that a defendant already in prison might receive a sentence at least partially concurrent with the one he is serving may be forever lost if trial of the pending charge is postponed.").



charged with a new criminal offense.<sup>322</sup> Because committing that crime will also violate the conditions of the defendant's release, the probation office will file a petition to revoke his release.<sup>323</sup> The defendant will then face two parallel proceedings: a criminal prosecution for the offense and a revocation proceeding for the violation.

This is where the timing becomes very important. If the defendant is sentenced for the offense around the same time that he is sentenced for the violation, then he can serve those two sentences *concurrently* with each other and reduce his total time in prison. Typically, however, both sides will seek to delay the revocation hearing until after the criminal prosecution is complete, because the government will want to save resources by using the conviction at trial as automatic proof of the violation, and the defendant will not want to present his defense for the first time under the lower standard of proof applied to revocation.<sup>324</sup>

But this is a very dangerous situation for the defendant, because any delay after he is sentenced for the offense will deny him the opportunity to seek imposition of a concurrent sentence for the violation. In other words, he will have to serve his offense sentence while waiting for his violation sentence, reducing his available time to serve those sentences concurrently. The longer the delay, the more of the offense sentence he will serve, and the more of the violation sentence he will have to serve *consecutively*, increasing his total time in prison. If the delay lasts long enough, he may complete the sentence for the offense and be forced to serve an entirely consecutive sentence for the violation, significantly increasing his total term of imprisonment.

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322. In "most" revocation cases, "the probationer or parolee has been convicted of committing another crime or has admitted the charges against him." *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

323. Every term of supervised release must include a condition that the defendant "not commit another Federal, State, or local crime . . ." 18 U.S.C. § 3583(d) (2012). The Double Jeopardy Clause has been held not to prohibit revocation of release based on conduct that is also charged separately as a new criminal offense. *See, e.g.*, *United States v. Wyatt*, 102 F.3d 241, 245 (7th Cir. 1996); *United States v. Woodrup*, 86 F.3d 359, 363 (4th Cir. 1996); *United States v. Soto-Olivas*, 44 F.3d 788, 789–90 (9th Cir. 1995).

324. *See United States v. Goodon*, 742 F.3d 373, 375–76 (8th Cir. 2014); *United States v. Spraglin*, 418 F.3d 479, 481 (5th Cir. 2005); *United States v. Huusko*, 275 F.3d 600, 602 (7th Cir. 2001); *see also United States v. Poellnitz*, 372 F.3d 562, 571 (3d Cir. 2004).

Under Speedy Trial Clause precedents, a delay of more than one year is presumptively unlawful,<sup>325</sup> and delays of four or five years are considered “extraordinary.”<sup>326</sup> Yet the circuit courts have relied on the Supreme Court’s parole precedents to reject challenges to four, five, even twelve-year delays of hearings to revoke supervised release, even when those delays denied the defendants the chance to seek a concurrent sentence.<sup>327</sup> These decisions must be reconsidered in light of the three differences between parole and supervised release outlined above:

- Because defendants have not been granted early release, courts should apply more scrutiny to delayed hearings to revoke supervised release.
- Because there is no rehabilitative justification for delaying a hearing to revoke supervised release, courts should measure delay from the date of accusation rather than the date of custody.
- Because district courts do not have the same power as the Parole Commission to impose retroactively concurrent sentences, courts should recognize the harm defendants suffer when they are denied the opportunity to seek a concurrent sentence.

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325. *Doggett v. United States*, 505 U.S. 647, 652 n.1 (1992).

326. *Barker v. Wingo*, 407 U.S. 514, 533 (1972).

327. *See, e.g.*, *United States v. Goode*, 700 F. App’x 100 (3d Cir. 2017) (five-year delay); *United States v. Magnan*, 700 F. App’x 838, 840 (10th Cir. 2017) (twelve-year delay); *United States v. Ivy*, 678 F. App’x 369, 372 (6th Cir. 2017) (six-year delay); *United States v. Arellano*, 645 F. App’x 235, 235–36 (4th Cir. 2016) (six-year delay); *United States v. Griggs*, 507 F. App’x 196, 200 (3d Cir. 2012) (two-year delay); *United States v. Oidac*, 486 F. App’x 318, 322 (3d Cir. 2012) (twelve-year delay); *United States v. Hicks*, 453 F. App’x 940, 942 (11th Cir. 2012) (five-year delay); *United States v. Magana-Colin*, 359 F. App’x 837, 837 (9th Cir. 2009) (three-year delay); *United States v. Ramos*, 401 F.3d 111, 113 (2d Cir. 2005) (two-year delay); *United States v. Gomez-Aguilar*, 769 F. App’x 412 (9th Cir. 2003), *cert. denied*, No. 19-6397, 2019 WL 6689793 (Dec. 9, 2019) (three-year delay); *United States v. Sanchez*, 225 F.3d 172, 175 (2d Cir. 2000) (four-year delay); *United States v. Throneburg*, 87 F.3d 851, 852 (6th Cir. 1996) (two-year delay); *United States v. Tippens*, 39 F.3d 88, 89 (5th Cir. 1994) (two-and-a-half-year delay); *United States v. Chaklader*, 987 F.2d 75, 77 (1st Cir. 1993) (twenty-one-month delay); *United States v. Manson*, No. 08-CR-877, 2014 WL 2434476 (E.D.N.Y. May 29, 2014) (five-year delay); *United States v. Escobar-Izaguirre*, No. 2:09 CR 110, 2011 WL 3321304 (N.D. Ind. Aug. 1, 2011) (two-year delay); *United States v. Herrera-Castellanos*, No. 03-1825GT, 2010 WL 4639256 (S.D. Cal. Nov. 8, 2010) (five-year delay); *Allen v. United States*, No. 3:04CR017-GHD, 2008 WL 5082119 (N.D. Miss. Dec. 2, 2008) (three-year delay); *United States v. Cobbs*, 436 F. Supp. 2d 860, 861 (E.D. Mich. 2006) (five-year delay); *United States v. Lopez*, 985 F. Supp. 59, 60 (D.R.I. 1997) (thirty-two month delay).

In sum, courts should provide defendants on supervised release more protection against delay than parolees by scrutinizing delays more carefully, measuring delay from the date of formal accusation, and recognizing the prejudice that results from a lost concurrent sentence.

*A. No Early Release Justifying Reduced Constitutional Protection*

Because supervised release is an additional penalty rather than a relief from punishment, courts should be less tolerant of delayed hearings to revoke supervised release. Although the Supreme Court's narrow reading of the Speedy Trial Clause likely excludes proceedings to revoke supervised release,<sup>328</sup> defendants are still protected by the due process right to a hearing "within a reasonable time."<sup>329</sup> Speedy trial precedents are "applicable . . . by analogy," even if they are not "directly controlling."<sup>330</sup>

Though recognizing the right to a timely revocation hearing, the circuit courts have so far provided defendants on supervised release the same meagre safeguards against delay they afforded to parolees.<sup>331</sup> Speedy Trial Clause precedents recognize "anxiety and concern" as sufficient harm to establish a constitutional violation,<sup>332</sup> yet the courts have held that defendants challenging delayed revocation hearings must show prejudice "aside from the anxiety of awaiting . . . revocation proceedings."<sup>333</sup> The courts have also permitted extremely long delays of revocation hearings that would never pass muster at trial.<sup>334</sup> These limited protections should be reconsidered, because defendants on supervised release have a stronger claim to speedy trial rights than parolees, making long delays more unreasonable and more stressful.

At a parole revocation hearing, the hearing body had to decide whether to revoke the parolee's grant of release as part of a failed "risk" that he would not engage in further antisocial behavior.<sup>335</sup> That

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328. See *Betterman v. Montana*, 136 S. Ct. 1609 (2016); see also *Goode*, 700 F. App'x at 103; *Ivy*, 678 F. App'x at 372; *Oidac*, 486 F. App'x at 321; *Ramos*, 401 F.3d at 115; *Tippens*, 39 F.3d at 89 (citing *Moody v. Daggett*, 429 U.S. 78 (1976)).

329. *Morrissey v. Brewer*, 408 U.S. 471, 488 (1972).

330. See *United States v. Santana*, 526 F.3d 1257, 1260, 1262 (9th Cir. 2008).

331. See *id.* at 1261.

332. *Barker v. Wingo*, 407 U.S. 514, 519–20, 532 (1972).

333. *Oidac*, 486 F. App'x at 322–23; see also *Santana*, 526 F.3d at 1261.

334. See *supra* note 312.

335. *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972).

risk entitled the government to delay the revocation proceeding in order to maximize its available information.<sup>336</sup> In fact, deferring the revocation hearing arguably helped the parolee by allowing him to retain the “benefit” of the release for more time.<sup>337</sup>

At a supervised release revocation hearing, by contrast, the court is not reviewing a failed “risk,” because the defendant has not been granted early release, but instead has served his prison sentence in full, followed by a term of supervision in the community. The government therefore has less justification for postponing the proceedings. A delayed hearing to revoke supervised release also inflicts more “anxiety and concern” than a parole revocation, because the defendant faces uncertain punishment freshly determined by the district judge, rather than a return to prison for the balance of a remaining prison term.<sup>338</sup>

Although Speedy Trial Clause precedents do not directly control revocation of supervised release, they should be treated as more persuasive in this context than under parole. Multi-year delays that were not previously considered unreasonable should be viewed with greater skepticism. Courts should also acknowledge the harm that long delay does to defendants on supervised release by causing them anxiety and concern about the upcoming proceedings.

### *B. No Rehabilitative Reason for Delaying Hearing*

Because supervised release revocations are more punitive than parole revocations, there is less justification for delaying the proceedings. Like delayed trials, therefore, delayed hearings to revoke supervised release should be measured from the date of official accusation. The circuit courts, however, are currently split over how to measure delayed hearings to revoke supervised release. Some courts measure from the filing of the violation petition, while others measure from the date of custody. This issue is outcome determinative in many cases,<sup>339</sup> reflecting profound disagreement about how to analyze

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336. *Moody v. Daggett*, 429 U.S. 78, 89 (1976).

337. Transcript of Oral Argument at 32, *United States v. Haymond*, 139 S. Ct. 2369 (2019) (No. 17-1672).

338. *See Barker v. Wingo*, 407 U.S. 514, 519–20, 532 (1972).

339. For example, imagine a defendant on supervised release who commits a new crime and is held in state custody for five years pending resolution of his state case, and only then is finally transferred to federal custody for a revocation hearing. Measuring from the date of the violation

delayed hearings to revoke release. In recognition of the different theories of punishment that animate parole and supervised release revocation, courts should resolve this split by measuring delayed supervised release revocations from the filing of the violation petition.

The measurement of delayed hearings to revoke supervised release has split the circuit courts. At least two courts officially measure delay from the filing of the violation petition, holding that like criminal trials, delayed hearings to revoke supervised release should be measured from the date of official accusation.<sup>340</sup> Several other circuit panels, by contrast, have measured from the date of custody, holding that, like delayed parole revocations, delayed hearings to revoke supervised release should be measured from the date the defendant is actually imprisoned for the violation.<sup>341</sup> Finally, two circuit courts have combined these approaches, holding that delay should be measured from the filing of the violation petition with respect to prejudice to the defendant's ability to defend against the violation, but from the date of custody with respect to any other kind of prejudice.<sup>342</sup>

Resolving this circuit split requires reexamining the rehabilitative logic of *Moody*. In that case, the Supreme Court denied the parolee's request for a "prompt" parole revocation hearing by citing the "practical" justification that delaying the hearing was essential to its rehabilitative function.<sup>343</sup> Since the parolee was in prison for a new crime and had obviously violated his conditions of release, "the only remaining inquiry" at the hearing would be a "prediction" of whether

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petition would make the delay five years, while measuring from the date of custody would make the delay negligible. *See, e.g.*, *United States v. Goode*, 700 F. App'x 100 (3d Cir. 2017).

340. *See United States v. Rasmussen*, 881 F.2d 395, 398 (7th Cir. 1989); *see also United States v. Oidac*, 486 F. App'x 318, 321, 322 n.8 (3d Cir. 2012); *United States v. Pagan-Rodriguez*, 600 F.3d 39, 41–42 (1st Cir. 2010); *United States v. Cockrane*, No. 96-4470, 1997 WL 51646, at \*1 (4th Cir. Feb. 10, 1997).

341. *See United States v. Ivy*, 678 F. App'x 369, 373–74 (6th Cir. 2017); *see also United States v. Arellano*, 645 F. App'x 235, 236 (4th Cir. 2016); *United States v. Magana-Colin*, 359 F. App'x 837, 837–38 (9th Cir. 2009); *United States v. Cunningham*, 150 F. App'x 994, 996 (11th Cir. 2005).

342. *See United States v. Ramos*, 401 F.3d 111, 115–16 (2d Cir. 2005); *United States v. Tippens*, 39 F.3d 88, 90 (5th Cir. 1994). These cases hold that delay between the filing of the petition and the hearing is prejudicial only if it "substantially limit[s] the ability to defend against the charge that the conditions of supervised release were violated." *Ramos*, 401 F.3d at 116; *see also Tippens*, 39 F.3d at 90 ("delay in executing a violator's warrant" contravenes due process only "if the delay undermines his ability to contest the issue of the violation or to proffer mitigating evidence"). Aside from this specific kind of prejudice, the defendant has no cause to complain about a delayed hearing "until he is taken into custody." *Ramos*, 401 F.3d at 115.

343. *Moody v. Daggett*, 429 U.S. 78, 81, 89 (1976).

he had been cured of his “antisocial” tendencies and was ready to return to the community.<sup>344</sup> “In making this prophecy,” the Court said, “a parolee’s institutional record can be perhaps one of the most significant factors.”<sup>345</sup> It therefore made sense to delay the hearing until the defendant was actually taken into custody on the violation warrant, at which point that “prediction [wa]s both most relevant and most accurate.”<sup>346</sup>

When sentencing a defendant for a supervised release violation, by contrast, district judges are *forbidden* from considering rehabilitation.<sup>347</sup> Rather, they must “primarily aim[] at sanctioning th[e] [defendant’s] breach [of trust]”<sup>348</sup> or, “analogously, . . . ‘provide just punishment for the offense’ of violating supervised release.”<sup>349</sup> Judges are instructed to focus on “the seriousness of the underlying violation and the criminal history of the offender,”<sup>350</sup> not the defendant’s “institutional record.”<sup>351</sup> There is therefore no rehabilitative justification for delaying the revocation hearing. In fact, rather than aid in the revocation decision, delay after the filing of the violation petition is likely to *reduce* the accuracy of the hearing, which is aimed at determining a punishment for a past violation, not predicting future conduct.

Because supervised release revocation is a more punitive proceeding than parole revocation, *Moody*’s approach to measuring delay does not apply. Instead, delay should be measured from the date of the official accusation, which is the filing of the violation petition. This approach will not only ensure the accuracy of the hearings, but also protect the defendant’s constitutional rights by ensuring that the court considers the full extent of the delay.

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344. *Id.* at 89.

345. *Id.*

346. *Id.*

347. *See* 18 U.S.C. § 3582(a) (2012) (“The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.”).

348. *United States v. Phillips*, 791 F.3d 698, 701 (7th Cir. 2015).

349. *United States v. Lewis*, 498 F.3d 393, 400 (6th Cir. 2007).

350. U.S. SENTENCING GUIDELINES MANUAL § 7A3(b) (U.S. SENTENCING COMM’N 2018).

351. *Cf. Moody*, 429 U.S. at 89 (explaining that the defendant’s “institutional record” is one of the most important factors in a parole revocation hearing).

*C. No Administrative Flexibility to Impose  
Retroactively Concurrent Sentence*

Because district courts do not have the same power as the Parole Commission to impose retroactively concurrent sentences, delay can harm a defendant on supervised release by depriving him of the opportunity to seek concurrent sentencing. The courts of appeals, however, have failed to recognize this harm, confusing the broad administrative authority of the Commission with the more limited power of district courts. As a result, the courts have wrongly applied parole precedents to deny challenges to delayed hearings to revoke supervised release, even where those delays denied defendants their opportunity to seek concurrent sentences and thereby increased their total time in prison.

The Second Circuit's decision in *United States v. Sanchez*<sup>352</sup> provides vivid illustration of this unfortunate pattern. The defendant in that case was serving a five-year term of supervised release when he was arrested by local police and pled guilty to a state drug charge.<sup>353</sup> He served approximately two years in state prison and was released.<sup>354</sup> Over four years later, the federal government sought to revoke his supervised release based on the state drug conviction.<sup>355</sup> The district court revoked his release and sentenced him to another eighteen months imprisonment.<sup>356</sup>

On appeal, the defendant argued that the four-year delay violated his right to a revocation hearing within a reasonable time, because it cost him the chance to seek a sentence for the violation that would run concurrently to his state prison term.<sup>357</sup> The Second Circuit rejected this argument, noting that under “*Moody* . . . [the defendant] was not prejudiced by the delay because the district court had the power to grant the equivalent of a concurrent sentence retroactively for [the defendant's] violation of supervised release.”<sup>358</sup> Multiple other courts of appeals have since applied this same reasoning to hold that

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352. 225 F.3d 172 (2d Cir. 2000).

353. *Id.* at 174.

354. *Id.*

355. *Id.*

356. *Id.* at 175.

357. *Id.*

358. *Id.*

defendants are not prejudiced by delayed hearings to revoke supervised release.<sup>359</sup>

These decisions are demonstrably wrong, however, because district courts do not have the same power as the Parole Commission to impose retroactively concurrent sentences. Under the parole regulations, the Commission was empowered to credit a parolee for any time served on criminal conduct underlying a parole violation.<sup>360</sup> Thus, as the Supreme Court said in *Moody*, the Commission could “grant, retroactively, the equivalent of concurrent sentences.”<sup>361</sup> As a result, a delayed parole revocation could not harm a parolee by denying him the chance to seek a concurrent sentence, because the Parole Commission could always grant the parolee credit toward the violation sentence for the time he had already served on the underlying offense.<sup>362</sup>

District courts, by contrast, have no authority to impose retroactively concurrent sentences. Instead, federal law mandates that “[a] sentence to a term of imprisonment commences on the date the defendant is received . . . at, the official detention facility at which the sentence is to be served.”<sup>363</sup> Courts may not “award credit at sentencing” for time served,<sup>364</sup> nor may they impose a sentence

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359. See *United States v. Goode*, 700 F. App'x 100, 104 (3d Cir. 2017) (“[T]he District Court certainly could have ordered . . . that [the defendant’s] federal sentence for violating supervised release run retroactively concurrently with his state sentence.”); *United States v. Tippens*, 39 F.3d 88, 90 (5th Cir. 1994) (“[The defendant] has not been prejudiced by the delay. It did not impair his ability to contest the revocation. And, the district court had the ability ‘to grant, retroactively, the equivalent of concurrent sentences.’” (quoting *Moody v. Daggett*, 429 U.S. 78, 87 (1976))); *United States v. Chaklader*, 987 F.2d 75, 77 (1st Cir. 1993) (“[T]he passage of twenty-one months in no way restricted the court’s ability ‘to grant, retroactively, the equivalent of concurrent sentences.’” (quoting *Moody*, 429 U.S. at 87)); see also *United States v. Garrett*, 253 F.3d 443, 447–48 (9th Cir. 2001) (“The Court in *Moody* unambiguously held that the federal government is not constitutionally required to writ a defendant out of state custody and into federal custody for purposes of executing a violation warrant. Furthermore, the opinion clarifies that a defendant cannot claim prejudice from such a delay on the ground that he is unable to serve his multiple sentences concurrently.”); *United States v. Escobar-Izaguirre*, No. 2:09-CR 110, 2011 WL 3321304, at \*5 (N.D. Ind. Aug. 1, 2011); *United States v. Lopez*, 985 F. Supp. 59, 64–65 (D.R.I. 1997).

360. See 28 C.F.R. § 2.21(b)(1)–(2) (1976) (“If a finding is made that the prisoner has engaged in behavior constituting new criminal conduct . . . [t]ime served on a new state or federal sentence shall be credited as time in custody.”).

361. *Moody*, 429 U.S. at 87–88 (citing 28 C.F.R. §§ 2.21, 2.52(c)(2) (1976)).

362. See *id.* at 87.

363. 18 U.S.C. § 3585(a) (2012); see also *United States v. Flores*, 616 F.2d 840, 841 (5th Cir. 1980) (“[A] federal sentence cannot commence prior to the date it is pronounced, even if made concurrent with a sentence already being served.”).

364. *United States v. Wilson*, 503 U.S. 329, 333–34 (1992); see also *United States v. Gonzalez*, 192 F.3d 350, 355 (2d Cir. 1999).



concurrent with one the defendant has already completed.<sup>365</sup> At best, a judge can *recommend* to the Bureau of Prisons that the defendant receive credit for time served on another prison term,<sup>366</sup> but that recommendation is not binding and the Bureau has the final say.<sup>367</sup> The Sentencing Guidelines, moreover, recommend that revocation sentences run consecutively to other prison sentences, even if they are based on the same conduct.<sup>368</sup>

Because district courts do not have the same power as the Parole Commission to impose retroactively concurrent sentences, *Moody* does not apply to defendants on supervised release. Instead, a delayed hearing to revoke supervised release *can* inflict substantial harm on a defendant by denying him the chance to seek a concurrent sentence and forcing him to serve his violation sentence consecutively to the offense sentence, thereby extending his total time in prison. A longer prison term is a vivid form of unconstitutional prejudice and deserves recognition when courts review challenges to delayed hearings to revoke supervised release.

## VI. CONCLUSION

The replacement of parole with supervised release transformed federal community supervision in dramatic ways that should be reflected in constitutional law. Although the circuit courts regard them as “constitutionally indistinguishable,”<sup>369</sup> there are actually three key differences between parole and supervised release: their method of

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365. See *United States v. Lucas*, 745 F.3d 626, 629 (2d Cir. 2014) (“Nothing . . . authorizes the district court to extend the benefit of a concurrent sentence to . . . those who have previously served sentences, now completed, for related crimes.”); *United States v. Fay*, 547 F.3d 1231, 1236 (10th Cir. 2008) (“A district court . . . does not have the authority to impose a sentence to be served concurrently with a discharged sentence.”); *United States v. Labeille-Soto*, 163 F.3d 93, 99 (2d Cir. 1998) (“There is no provision . . . stating that the court may order that the sentence it imposes be deemed to have been served concurrently with a prior prison term that has been fully discharged.”).

366. See 18 U.S.C. § 3621(b) (2012); see also *Rogers v. United States*, 180 F.3d 349, 356–58 (9th Cir. 1999); *McCarthy v. Doe*, 146 F.3d 118, 120 (2d Cir. 1998); *Barden v. Keohane*, 921 F.2d 476, 477–78 (3d Cir. 1990).

367. See *Taylor v. Sawyer*, 284 F.3d 1143, 1149 (9th Cir. 2002); see also *United States v. Pineyro*, 112 F.3d 43, 45–46 (2d Cir. 1997) (“The district court’s recommendation was not binding on BOP, as we have explained.”). A truly determined judge might attempt to achieve the same effect as a retroactively concurrent sentence by imposing a shorter prison term, see *United States v. Dorsey*, 166 F.3d 558, 560 (3d Cir. 1999), but that would require a downward variance from the range recommended by the Sentencing Guidelines.

368. U.S. SENTENCING GUIDELINES MANUAL § 7B1.3(f) (U.S. SENTENCING COMM’N 2018); U.S. SENTENCING GUIDELINES MANUAL § 7B1.4(a) (U.S. SENTENCING COMM’N 2016).

369. *United States v. Hall*, 419 F.3d 980, 985 n.4 (9th Cir. 2005).

imposition (relief/penalty), their theory of punishment (rehabilitative/punitive), and their governing institutions (agency/courts).

These differences *change* how the Constitution applies to each system, calling into question numerous circuit court decisions applying parole precedents to supervised release. The Supreme Court's parole revocation decisions depended on parole's unique nature as an administrative process aimed at rehabilitating prisoners by granting them early release. Those decisions do not apply to supervised release, which instead is a judicial sentence imposed to punish defendants beyond their original prison terms.

Supervised released is truly a “unique” form of post-release supervision,<sup>370</sup> a significant feature of the federal justice system that impacts nearly every criminal defendant and is responsible for the incarceration of tens of thousands. It requires a fresh constitutional analysis, based on its distinctive qualities, to ensure that mass supervision does not overtake the “ancient protections” of the Bill of Rights.<sup>371</sup>

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370. *Gozlon-Peretz v. United States*, 498 U.S. 395, 407–08 (1991).

371. *See United States v. Haymond*, 139 S. Ct. 2369, 2382 (2019).

